No. 262.

In the Supreme Court U.S.
October Term, 1890.
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1890.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.
FANNIE CRAVENS,
Defendant in Error.

No. 262.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, ASSIGNMENTS OF ERROR AND BRIEF FOR PLAINTIFF IN ERROR.

FREDERICK N. JUDSON,
For Plaintiff in Error.

GEO. W. HUBBELL,
Of Counsel.

W. J. HERR, 204 OLIVE ST.

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This is a suit upon a policy of life insurance for ten thousand dollars, issued by plaintiff in error upon the life of J. K. Cravens, deceased. The issue presented upon the pleadings and an agreed statement of facts, whereon the cause was submitted to the trial court, was whether defendant in error, as beneficiary in the policy in suit, was entitled, upon the admitted default, after payment of four annual premiums, to the amount of commuted insurance

provided in the policy and tendered by plaintiff in error, to-wit, twenty-six hundred and seventy dollars ($2670), or, as claimed by the defendant in error, to extended insurance, as set forth in Section 5983, Revised Statutes of Missouri, 1889—that is, to the face of the policy, less unpaid premiums. The Circuit Court gave judgment for the former sum, in accordance with the contention of plaintiff in error, being the amount tendered in its answer. But this judgment was reversed by the Supreme Court of Missouri, which directed judgment to be entered for defendant in error for the full amount claimed, to-wit, eighty-seven hundred and forty-nine dollars and twenty-one cents ($8749.21).

There was no controversy as to the facts, the case being submitted to the trial court upon the pleadings and agreed statement of facts, and the material parts thereof are as follows:

Plaintiff in error was a mutual life insurance company, organized under the laws of the State of New York, without capital stock, and at the time of issuing the policy in question was engaged in the business of insuring lives, through branch offices situated in different States of this country and in foreign States, the company being conducted strictly upon the mutual plan, the premiums paid, less the expense of management, being administered solely for the benefit of the policy-holders.

In 1887 and many years prior thereto, plaintiff in error had maintained branch offices in the State of Missouri, employing agents to solicit applications for insurance from citizens of Missouri, having received a certificate of authority from the State Superintendent of Insurance, and during the year 1886 the amount of policies issued by plaintiff in error to citizens of Missouri was $1,617,985, while the total amount of insurance policies issued by plaintiff in error in that year to citizens of different States of the country and of foreign countries

aggregated $85,178,294—that the total amount of insurance in force on the lives of citizens of Missouri on December 3, 1886, was $8,886,542, while the total amount of policies in force in the United States and in foreign countries was $304,373,540.

On May 2, 1887, John K. Cravens, then a citizen of Kansas City, Missouri, made written application, through its local agent, to plaintiff in error for a policy of insurance upon his life, on the *non-forfeiture limited tontine* plan, with tontine period of fifteen (15) years, the payments to be completed in fifteen (15) annual payments. An abstract of this application is set out on the third page of the policy sued on. (See Rec., p. 22.) The application was signed by the insured, and by him for the beneficiary, and contains the following express agreement:

"2. That inasmuch as only the officers of the home "office of the said company in the City of New York have "authority to determine whether or not a policy shall issue "on any application, and as they act on the written state- "ments and representations referred to, no statements, "representations, promises, or information made or given "by or to the person soliciting or taking this application "for a policy, or by or to any other person, shall be bind- "ing on said company, or in any manner affect its rights, "unless such statements, representations, promises or "information, be reduced to writing and presented to "the officers of said company, at the home office in this "application. * * * "

"5. That the contract contained in such policy, and "in this application, shall be construed *according to the "laws of the State of New York*, the *place of said con- "tract* being agreed to be the *home office of said company* "in the *City of New York*."

This application thus signed was forwarded to the home office of the company in the *City of New York*, and *there*, upon consideration, was *accepted* and approved, and policy No. 250,213, was thereupon executed by the officers of the company at the home office, and trans-

mitted to Kansas City and there delivered to the insured, on the payment of the first annual premium to the local agent. An abstract of the written application upon which the policy was issued, was set out on the third page of the policy.

The non-forfeiting limited tontine policy, fifteen year endowment, with the limited premium return plan of insurance, which was selected by the applicant in the written application, was set forth in the policy, and the essence of the plan consisted in the fact that no dividend should be allowed or paid upon the policy unless the person insured should complete the *fifteen* year tontine dividend period, and *unless the policy should be then in force*, and that the surplus or profits derived from such policies of a class as should then be in force, should *be apportioned among* the *survivors of the tontine class*; that is to say, all the policies issued in that year of that class, were allowed at the expiration of the period, the option of taking their profits in the form of continued insurance or annuities, or cash, as they might prefer.

It appears from Section 14 of the agreed statement that the total number of policies belonging to this class, that is, issued upon this plan during the year 1887 by the company, issued to the residents of all the States and countries wherein the company did business, was five thousand one hundred and seventy-two (5172), covering aggregate insurance in the sum of twenty million one hundred fifty-four thousand nine hundred and eighty-one dollars ($20,154,981). The insured and the other policy-holders of this tontine class thus became entitled to *reciprocal rights*, in the *contingency of survivorship*, in surplus profits accruing to all the policies of the same class.

Policies of this tontine class were entitled to a grace of one monthin the payment of premiums. (Rec., p. 19.) The policy contained the following express condition and agreement as to paid up insurance in case of

default during the tontine period, being the same as that expressly set out in the application for the policy, and being a feature of the class of insurance specifically selected by the insured in his application. (Rec., p. 18.)

"If the premiums are not paid, as hereinafter pro-"vided, on or before the days when due, then this policy "shall become void, and all payments previously made "shall be forfeited to the company, except that if this "policy, after being enforced three full years, shall lapse "or become forfeited for the non payment of any prem-"iums, a *paid-up policy* will be issued on demand made "within six months after such lapse, with surrender of "this policy, under the same conditions as this policy, "except as to payment of premiums, but without partici-"pation in profits, for the amount equal *to as many "fifteenth parts of the sum above insured as there shall "have been complete annual premiums paid thereon*, when "said default in the payment of premium shall be made, "and all right, claim or interest arising under the statute "or otherwise, to or in any other paid up-up policy or "surrender value, and to or in any temporary insurance, "whether required or provided for by the statute of any "State, is hereby expressly waived or relinquished."

It was noted in the application (Rec., p. 24) that an affirmative answer to the question asking whether the foregoing was agreed to by the applicant, was a necessary condition to the issue of the policy.

The policy by its terms is payable at the home office of the company in the City of New York, and by its terms all premiums are payable at the home office of the company, but may be paid to agents producing receipts signed by the president, vice-president and actuary, and countersigned by the agents.

Mr. Cravens, the insured, paid the premiums upon the policy for four years, but made default in the payment due on May 11, 1891, and he died on November 2, 1892, leaving that and all subsequent premiums unpaid.

No question is made that the company complied with the service of notice of premium required by the law of New York then in force, that the provisions of the policy were in accordance with the law of New York, and that the policy was forfeited but for the claim under the Missouri statutes set up by the defendant in error.

It is conceded that the amount of paid-up insurance to which the policy was entitled according to the terms of the application and policy was $2670, this being the same amount required by the statute, (Section 5858 Revised Statutes of 1879) on that class of policies, and that no demand was made by or on behalf of the insured within six months after default on May 11, 1891, or at any time. The company, upon receiving notice of the death of the insured, offered to waive the failure to make such demand, and tendered the beneficiary, and continued the tender at the time of the trial, of the amount of the paid-up policy to which the policy would have been entitled if such demand had been made, to-wit, $2670, but defendant in error refused to accept it, and insisted upon her right to recover *extended* insurance under the Missouri statutes.

THE PLEADINGS.

The petition (Rec., p. 3) set out the issuance of the policy in May, 1887, the payment of four annual premiums, until May, 1891, the death of insured November 2, 1892, alleged that under the statute the insurance was extended, and was in force at date of death, and asked judgment for the face of the policy, less the unpaid premiums.

The answer (Rec., p. 6) of defendant set up in substance the foregoing provisions of the application and policy—claimed that defendant was a purely *mutual* com-

pany—that the law of New York was thus by agreement of the parties made the applicatory law of the contract—set up the default of 1891, after paying four annual premiums and tendered the sum of $2670, the amount of paid-up or commuted policy, to which the original policy was entitled by its terms on such default, waiving the failure to make demand therefor.

The answer also set up that *other policy-holders, i. e.*, the other members of the same tontine class, had each by the terms of their policy contracts acquired with defendant in error contingent and mutual interests in the profits and surplus to be derived from the premiums on all the policies of such tontine class, and that the company on the faith of the insured's contract had incurred obligations to the other members of the tontine class, and that defendant in error was now *estopped* from setting up any other or different claim under the policy.

The answer further set up that the statute of Missouri in relation to the non-forfeiture of life insurance policies did not apply and had no reference to the policy sued on, in that the said contract was made under and with reference to the laws of New York, and that the application for the policy was accepted in the State of New York, and that by the express agreement of the parties to the policy, and of all parties interested in the tontine class, the law of New York was made the applicatory law of the contract. It was further set up that the right to make the contract was a right guaranteed and secured by the Bill of Rights and Constitution of Missouri, and by the Constitution of the United States, and that if the statute relied upon by defendant in error was construed to apply to the policy and to nullify the agreement of the parties, upon the faith of which the policy was issued, and without which it would not have been issued, then the statute so construed was violative of the said constitutional right and

immunity secured to plaintiff in error by the Constitution of the State of Missouri and by the Constitution of the United States.

The Missouri Statute.

The sections of the Missouri statutes relied upon by defendant in error in the Circuit Court and construed by the Supreme Court of Missouri are as follows:

"SEC. 5856. POLICIES NON-FORFEITABLE—WHEN. "—No policies of insurance on life hereafter issued by "any life insurance company authorized to do business in "this State on and after the 1st day of August, A. D. "1879, shall, after payment upon it of two full annual "premiums, be forfeited or become void by reason of the "non-payment of premium thereon, but it shall be subject "to the following rules of commutation, to-wit: The net "value of the policy, when the premium becomes due and "is not paid, shall be computed upon the American exper- "ience table of mortality, with four and one-half per "cent. interest per annum, and after deducting from "three-fourths of such net value any notes and other "indebtedness to the company given on account of past "premium payments on said policy issued to the insured, "which indebtedness shall then be canceled; the balance "shall be taken as a single net premium for temporary "insurance for the full amount written in the policy, and "the term for which such temporary insurance shall be in "force shall be determined by the age of the person "whose life is insured at the time of default of premium, "and the default of premium and the assumption of mor- "tality, and interest aforesaid; but if the policy shall be "an endowment, payable at a certain time, or at death if "it should occur previously, then if what remains as "aforesaid shall exceed the net single premium for a pure "endowment term, for the full amount of the policy, such "excess shall be considered as a single net premium for "a pure endowment for so much as such premium will "purchase, determined by the age of the insured at date "of default in the payment of premium on the original "policy, and the table of mortality and table as aforesaid,

"which amount shall be paid at end of the original term "of endowment, if the insured shall then be alive."

"SEC. 5857. A PAID-UP POLICY MAY BE DETER- "MINED, WHEN.—At any time after the payment of two "or more full annual premiums, and not later than sixty "days from the beginning of the extended insurance pro- "vided in the preceding section, the legal holder of the "policy may demand of the company, and the company "shall issue its paid-up policy, which, in the case of "any ordinary life policy, shall be for such an amount "as the net value of the original policy at the age and "date of lapse, computed according to the actuaries' or "combined experience table of mortality, with interest at "the rate of four per cent per annum, without deduction "for indebtedness on account of said policy, will pur- "chase, applied as a single premium upon the table rates "of the company; and in case of a limited payment life "policy, or of a continued payment endowment policy, "payable at a certain time, or at death, it shall be for an "amount bearing such proportion to the amount of the "original policy as the number of such annual premiums "actually paid shall bear to the number of such annual pre- "miums stipulated to be paid: *Provided*, That from such "amount the company shall have the right to deduct the net "reversionary value of all indebtedness to the company on "account of such policy; *and provided further*, that the "policy-holder shall, at the time of making demand for "such paid-up policy, surrender the orignal policy, legally "discharged, at the parent office of the company."

"SEC. 5958. RULE OF PAYMENT ON COMMUTED POL- "ICY.—If the death of the insured occur within the term of "temporary insurance covered by the value of the policy "as determined by Section 5856, and if no condition of "the insurance other than the payment of premiums shall "have been violated by the insured, the company shall "be bound to pay the amount of the policy, the same as "if there had been no default in the payment of prem- "ium, anything in the policy notwithstanding; *Pro- "vided, however*, that notice of the claim and proof of the "death shall be submitted to the company in the same man- "ner as provided by the terms of the policy within ninety

"days after the decease of the insured; *and provided also*, "that the company shall have the right to deduct from the "amount insured in the policy the amount compounded "at six per cent. interest per annum of all the premiums "that had been forborne at the time of the decease, includ- "ing the whole of the year's premium in which the death "occurs, but such premiums shall in no case exceed the "ordinary life premium for the age at issue, with interest "as last aforesaid."

"SEC. 5859. THE FOREGOING PROVISIONS NOT "APPLICABLE, WHEN.—The three preceding sections "shall not be applicable in the followng cases, to-wit: If "the policy shall contain a provision for an unconditional "cash surrender value at least equal to the net single prem- "ium of the temporary insurance provided therefor, or "for the unconditional commutation of the policy to non- "forfeitable paid-up insurance for which the net value "shall be equal to that provided for in Section 5857, or "if the legal holder of the policy shall, within sixty days "after default of premium, surrender the policy and "accept from the company another form of policy, or if "the policy shall be surrendered to the company for a "consideration adequate in the judgment of the legal "holder thereof, then, and in any of the foregoing cases, "this Act shall not be applicable."

These sections being the same as sections 5983 to 5986 of the Revision of 1879, comprising what is known as the Non-Forfeiture Law of Missouri, the only change in the revision of 1889 being in a matter not involved in this case.

There is *no requirement* in the statutes of Missouri that foreign life insurance companies doing business in the State should *reincorporate as Missouri corporations*. On the contrary, the business of life insurance in the State is regulated by Article II, Chapter 89, General Statutes of 1889, Vol. II, pp. 1372 to 1387, and provision is made therein not only for the incorporation of domestic companies but for the issuance of licenses to foreign

companies. Each of the latter are required (Sec. 5842) to file with the State Insurance Department a duly certified copy of its *charter*, and to deposit with the Insurance Department of the State of Incorporation, or with the Insurance Department of Missouri, securities to the value of one hundred thousand dollars. Annual statement of business is required to be filed, and upon compliance with the foregoing provisions the foreign company receives from the Superintendent of Insurance a certificate of authority to do business in the State, which is annually renewed (Sections 5843 to 5847).

It was conceded by the agreed statement that if the Missouri statute was applicable to the policy, and if, further, the policy did not come within the exception of the statute, that then the defendant in error would be entitled to the amount claimed as extended insurance. It was also conceded that the value of a paid up policy provided by the policy, the amount whereof was tendered by plaintiff in error, to-wit, $2670, was equal in amount to the paid up insurance provided by the Missouri statute, and that plaintiff was only entitled to said sum, if the policy was held to be controlled by the law of New York.

It was contended by plaintiff in error in the Circuit Court that even if the policy was held to be a Missouri contract, and subject to the Missouri statutes, that it came within the exception of the statute providing for *paid-up* insurance in lieu of *temporary* insurance, and this amount was tendered by the plaintiff in error. This contention was sustained by the trial court, which rendered judgment for the amount thus tendered by the company, to-wit, $2670. An appeal was taken from this judgment by the defendant in error to the Supreme Court of Missouri. This court reversed the judgment of the Circuit Court, and ruled both questions involved in the case adversely to plaintiff in error. See opinion of Court (Rec., pp. 49 to 64).

The court held that the provision for paid-up insur-

ance in the statute was not applicable; that the policy was a *Missouri* contract, *made so* by force of the statute, which operated to *override the express agreement of the parties* upon the New York law as the applicatory law; that the statute made the policy a Missouri contract, and "being a Missouri contract, the statute then in force with reference to the subject matter of the contract entered into and became a part thereof, as much so as if copied therein." And the court denied the contention of plaintiff in error that the statute so construed would be violative of the Constitution of the United States. The court, therefore, reversed the judgment of the Circuit Court, and directed judgment against the plaintiff in error for the full amount claimed, to-wit, $8749.21, with interest from November 30, 1892.

The plaintiff in error having ineffectually moved for a rehearing, (Rec., pp. 46 and 47) setting up that the statute as construed by the court was violative of the Constitution of the United States, in that it destroyed the contractual liberty of the parties and made a new contract for them, and that the court's construction of the statute was destructive of the right of contractual association in mutual life insurance, was allowed a writ of error to this court.

The assignments of error, (Rec., p. 65) filed with the writ of error, are as follows:

Assignments of Error.

First. The decision and judgment of the Supreme Court of the State of Missouri, in construing the Statute of Missouri, Secs. 5983 to 5986, Rev. Stat., 1879, as denying the right to the parties to the contract of insurance sued upon to agree upon the applicatory law of said contract, violated the right, privilege, and immunity of this plaintiff in error, protected by the Constitution of the United States, and the fourteenth amendment thereof.

Second. The said statute of Missouri, as construed by said decision and judgment, is violative of the rights of this plaintiff in error under the Constitution of the United States and the fourteenth amendment thereof.

Third. The said statute of Missouri, as construed by said decision and judgment, making a new contract for the parties different from the contract made between the parties, is violative of the rights of this plaintiff in error under the Constitution of the United States and the fourteenth amendment thereof.

Fourth. The said statute of Missouri, as construed by the said decision and judgment, is an attempted regulation of commerce between the States.

Fifth. The said statute of Missouri, construed by said decision and judgment, denies plaintiff in error its contractual liberty without due process of law and is violative of the fourteenth amendment of the Constitution of the United States.

Sixth. The decision and judgment of the Supreme Court of Missouri is against the law.

Seventh. The decision and judgment of the Supreme Court of Missouri should have been in favor of this plaintiff in error, and the judgment of the Circuit Court herein should have been affirmed.

Wherefore this plaintiff in error filed this, its assignments of error herein, and prays that the judgment herein rendered by the Supreme Court of the State of Missouri be reversed.

POINTS.

I.

The statute of Missouri, as construed by the Supreme Court of that State, denying the contractual liberty of the parties to an interstate contract of mutual life insurance in determining in good faith the applicatory law of that contract, was violative of the contractual liberty secured by the Fourteenth Amendment of the Constitution of the United States, and a Federal question is thereby presented to this court.

Allgeyer vs. Louisiana. 165 U. S., 585.

The judgment of the Supreme Court of Missouri, directing judgment by the Circuit Court, was final, within the meaning of the judiciary act.

Mower vs. Fletcher, 114 U. S., 127.

II.

The applicatory law of an interstate contract is that with reference to which the parties contract, and in the case at bar, the law of New York was made the applicatory law of the policy, by the express agreement of the parties.

Wharton on Conflict of Laws, Sec. 12 and Sec. 426;

Story on Conflict of Laws, Sec. 272;

Dicey on Conflict of Laws, Sec. 567;

Robertson vs. Bland, 2 Burr, 1077;

Phillimore, 4 Int., 469;

Wayman vs. Southard, 10 Wheat, 1;

Scudder vs. Union Bank, 91 U. S., 406;

Cox vs. United States, 6 Peters, 172;

LaMar vs. Micou, 114 U. S., 218;

Watts vs. Camors, 115 U. S., 353,362;

Pritchard vs. Norton, 126 U. S., 124;

Washington Central Bank vs. Hume, 128 U. S., 195;

Liverpool Steam Co. vs. Phœnix Ins. Co., 129 U. S., 397;

Coglan vs. S. Carolina R. R. Co., 142 U. S., 109;

Shattuck vs. Ins. Co., 4 Clifford, 498;

Desnoyes vs. Insurance Co., 7 Ins. Law Journal, 918;

Lamb vs. Bowser, 7 Bissell, 315;

Parkin vs. Royal Exchange Co., 8 Ct. Ses., 2d Series, 465;

Russell vs. Mutual Benefit Ins. Co., 23 N. Y., 516;

Hyde vs. Goodnow, 3 N. Y., 25;

Voorhies vs. Peoples Mut. Ben. Society, 91 Mich., 469;

Thompson vs. Ketchum, 8 Johns Cas., 189;

Griesmer vs. Mutual Life Ins. Co., 10 Wash., 203;

Insurance Co. vs. Savings Bank, 19 C. C. A., 286;

American Credit Indemnity Co. vs. Carrollton Co. (2nd Circuit), 36 C. C., A. 671.

III.

This principle of universal law, that the applicatory law of an interstate contract is that with reference to which the parties have contracted, has been uniformly adopted and enforced by the courts of the different States and also by the Federal Courts, against life insurance companies doing business in such States, construing the provisions of the statutory law of the State of incorporation as entering into the policy-contracts of the parties.

Mutual Life Ins. Co., vs. Phinney, now pending in this court;

Equitable Life Assurance Society vs. Nixon, 26 C. C. A., 620;

Same vs. Trimble, 27 C. C. A., 404;

Mutual Life Ins. Co. vs. Hill (9th Cir.) 97 Fed. Rep., 263;

New York Life Ins. Co. vs. Dingley (9th Cir.) 93 Fed. Rep., 153; 35 C. C., A 215;

McConnell vs. Ins. Co. (6th Cir.) 34 C. C., A. 663.

Rosenplater vs. Prov. Sav. Life Ass'n (6th Cir.) 37 C. C. A, 568;

Hathaway vs. Mutual Life Ins. Co., (Circ. Court, Washington) 99 Fed. Rep., 534.

Muller vs. Ins. Co., 89 Texas, 261;

Smith vs. New York Life Ins. Co., (Texas) 41, S. W. R., 680;

Harrington vs. Home Life Ins. Co., Cal. 58, Pac. Rep., 180;

Griffith vs. New York Life Ins. Co., 101 Cal., 627;

Osborne vs. Ins. Co., 123, Cal., 610;

Johnson vs. New York Life Ins. Co. (Iowa), 78 N. W., 905;

Trimble vs. Ins. Co., 20 Wash., 386;

Warner vs. Association, 100 Mich., 157;

Bamholzer vs. New York Life Ins. Co., 74 Minn., 387;

Nall vs. Insurance Co. (Tenn.) 54 S. W. R., 109;

Insurance Co. vs. Ficklin, 74 Md,, 172;

Equitable Life Association vs. Trombold, 75 Ill. App., 43;

Seiders vs. Insurance Co., (Texas) 54 S. W. Rep., 753; reversing Civil Court of Appeals, 51 S. W. R., 547;

Linn vs. New York Life Ins. Co., 78 Mo. App., 192;

American Credit Co. vs. Carrollton, *supra.*

Rorer Interstate Law (2nd Ed.), pp. 110, 111;

Wharton, Conflict of Laws (2nd Ed.), Sec. 427.

IV.

Parties to an interstate contract may contract in good faith for the law of the State of either, and the law thus agreed upon will be enforced in the other State as the law of the contract, although the domestic law of such State, which but for such agreement would have been the law of the contract, may be incapable of waiver. This is clearly illustrated in the case of usury laws in interstate contracts.

Freeland vs. Hern, 7. Cranch, 147;

Andrews vs. Pond, 13 Pet., 65;

Miller vs. Tiffany, 1 Wal., 298;

Johnson Bank vs. Bank of Ashland, 12 Wal., 266;

Story on Conflict of Laws, Sec. 304a and b;

McAllister vs. Smith, 17 Ills., 328, 65 Am. Dec. 651;

Smith vs. Muncie Nat. Bank, 29 Ind., 158;

2 Kent's Commentaries (13th Ed.), 459;

Smith vs. Parsons, 55 Minn., 521;

Hubbell vs. Morristown Co., 11 Pickle (Tenn.), 585;

Dygert vs. Vermont Loan & Trust Co., 9th Cir. 37 C. C. A. 389;

2 Parsons on Contracts, 95;

U. S. Savings & Loan Assoc. vs. Shain, 77 N. W. Rep., 1006;

Bank of Louisville vs. Young, 37 Mo., 407;

Insurance Co. vs. Simons, 52 Mo. App., 357;

Hysinger vs. Supreme Lodge, 42 Mo. App., 627;

This analogy of cases involving usury laws in interstate contracts applied to an interstate mutual life insurance contract in Seiders vs. Insurance Co. (Texas), 54 S. W. R., 753.

V.

This principle of universal law, whereunder parties to an interstate contract involving a choice of laws may select the applicatory law, is subject to two qualifications:

(*a*) That the choice is made in good faith and in

furtherance of the purposes of the contract, and not as an evasion of the local law; and

(*b*) That the foreign law agreed upon must not be prejudicial to the interests of the State where sought to be enforced, or violative of its public policy.

See authorities, *supra*.

VI.

The selection of the law of New York as the applicatory law of the interstate contract evidenced by the policy in suit, was reasonable and in furtherance of and indeed necessitated by the purposes of the contract, and was in no wise an attempted evasion of the laws of Missouri.

Wharton on Conflict of Laws, (2nd Ed.) 465;

2 May on Insurance, (2nd Ed.) Sec. 568;

Smith vs. N. Y. Life Ins. Co., 14 Allen 336;

Relf vs. Rundle, 103 U. S. 322;

N. Y. Life Ins. Co. vs. Statham, 93 U. S. 31.

VII.

The selection of the New York law as the applicatory law of the contract was necessitated by the nature of the contract and emphasized by the plan of insurance embodied therein, whereunder the other members of the tontine class acquired interests therein in consideration of the contingent interest enjoyed by the insured during his life in the policy contracts of his associates in the same class, and defendant in error as his representative, is therefore now estopped from asserting any other or different claim from that fixed under the law thus selected.

Century Dictionary, title "Tontine;"

Bogardus vs. Ins. Co., 101 N. Y., 329.

VIII.

As the selection of the New York law was necessary to the contract made by the parties—that is, to the tontine plan of insurance duly selected and adopted—it follows that even if there had been no express reference to the New York law, the parties would be presumed to have contracted with reference to that law.

Phillimore, 4th Int. 469, *supra;*

Pritchard vs. Norton, *supra;*

Wharton on Conflict of Laws, Sec. 507;

Gibson vs. Insurance Co., 77 Fed. Rep. 561.

IX.

The selection of the New York law as the applicatory law of the contract, being thus in furtherance of and necessitated by the contract, and the plan of insurance embodied therein, was in no wise in violation of Missouri law, or prejudicial to the interests of the State.

Session Acs of Missouri, 1895, p. 97;

Kerwin vs. Dolan, 29 Mo. App., 397.

See authorities, *supra.*

X.

Conceding that plaintiff in error, as a life insurance company of New York, was doing business in Missouri through the comity of the State, this did not disable the parties to this interstate contract from contracting in good faith under the foregoing rules of universal law, in furtherance of the purposes of their contract, as to the applicatory law thereof. This admission by comity did not make plaintiff in error a domestic corporation, and its

contracts with the citizens of Missouri are interstate contracts, governed by the foregoing rules of universal law.

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727;

Santa Clara County vs. So. Pac. R. R. Co., 118 U. S., 396;

Pembina Mining Co. vs. Pennsylvania, 125 U. S., 181;

Manhattan Life Ins. Co. vs. Fields (Texas), 62 S. W. R., 280;

Canada Southern R. R. Co. vs. Gebhard, 109 U. S., 527;

Louisville, Etc. R. R. Co. vs. Trust Co., 174 U. S., 552.

XI.

This right of choice of the applicatory law, subject to the foregoing qualifications, is inherent in the conception of an interstate contract, and the statute of Missouri, as construed by the Supreme Court of that State, deprives the parties to an interstate mutual life insurance contract of this essential element of the right of interstate contract.

Dicey on Conflict of Laws, p. 570;

Hubbell vs. Morristown Land & Improvement Co., *supra*;

Wayman vs. Southard, *supra*;

Horton vs. N. Y. Life Ins. Co., 151 Mo., 604.

XII.

The statute of Missouri, as construed by the Supreme Court, not only denies to the contracting parties, in making an interstate contract, the right of choice of the applicatory law, but makes a new contract for the parties

which they would not have made and contrary to their intent.

Ogden vs. Saunders, 12 Wheat., 258;

Keating vs. City of Kansas, 84 Mo., 415;

Ashbrook vs. Dale, 27 Mo. App., 649;

State to use of Wolf vs. Berning, 74 Mo., 87;

Reed vs. Painter, 129 Mo., 680;

Straube vs. Ins. Co., 123 Cal., 677.

XIII.

The selection in good faith of the applicatory law is an essential incident to the right of interstate contract, and the Missouri statute construed by the Supreme Court as denying this liberty of contract in this essential incident of interstate contract and making a new contract for the parties, violative of their intent, is violative of the constitutional guaranty of liberty of contract in the Fourteenth Amendment, which includes the right, thus denied, as essential to the right of interstate contract.

Allgeyer vs. Louisiana, *supra;*

Frisby vs. United States, 157 U. S., 160;

Holden vs. Hardy, 169 U. S.. 366;

State vs. Loomis, 115 Mo., 307;

State vs. Julow, 129 Mo., 163;

Millet vs. People, 117 Ill.; 294.

Trover vs. People, 141 Ill., 171;

Ramsey vs. People, 142 Ill., 380;

Braceville Coal Co. vs. People, 147 Ill., 66;

Richey vs. People, 154 Ill., 98;

Commonwealth vs. Perry, 155 Mass., 117;

Ex parte Ruback, 85 Cal., 274;

Johnson vs. Goodyear Mining Co., Cal., 59 Pac. Rep., 304;

Goodcharles vs. Wiseman, 113 Pa., 431;

Ex parte Jacobs, 98 N. Y., 98;

People vs. Marks, 99 N. Y., 377;

People vs. Gibson, 109 N. Y., 389;

State vs. Goodwell, 33 W. Va., 179;

Low vs. Reese Printing Co., 48 Neb., 127;

State vs. Sangle, 51 N. W. Rep., 858;

Harding vs. People, 160 Ill., 459;

XIV.

There is no judicial precedent sustaining the contention of defendant in error.

Equitable Life Ins. Co. vs. Clements, 140 U. S., 226;

Fletcher vs. N. Y. Life Ins. Co., 117 U. S., 519;

Maier vs. Ins. Co., 78 Fed. Rep., 566;

Paul vs. Virginia, 8 Wal., 168;

Insurance Co. vs. Daggs, 172 U. S., 557;

Washington Bank vs. Hume, 128 U. S., 195;

Pritchard vs. Norton, 126 U. S., 124;

Seidener vs. Merchants Life Ins. Soc., 54 S. W. Rep., 753 (Texas).

XV.

The Missouri statute as construed by the Supreme Court of that State, denying the right to select in good

faith the applicatory law of a contract of a mutual interstate life insurance, and making a new official contract violative of the intent of the parties, thus essentially denying the right to make interstate contracts of life insurance, was in effect an attempted regulation of commerce between the States.

Liverpool Ins. Co. vs. Mass., 10 Wallace, 573;

Statham vs. Insurance Co., *supra;*

Paul vs. Virginia, 8 Wallace, *supra;*

Addyston Pipe and Steel Co. vs. U. S., 175 U. S., 211;

Story on Conflict of Laws, Sec. 242;

In re Debs., 158 U. S., 564.

XVI.

The assertion of the constitutional protection of the right of interstate contract in mutual life insurance, and of the right of choice therein in good faith of the proper law of such contract under the rules of universal law, in no wise impairs the just authority of the State in the exercise of its legitimate police power, or in its control over foreign corporations doing business through comity in the State.

See authorities, *supra.*

XVII.

The judgment of the Supreme Court of Missouri should be reversed.

See authorities, *supra.*

ARGUMENT.

I.

The statute of Missouri as construed by the Supreme Court of that State, denying the contractual liberty of the parties to an inter-state contract of mutual life insurance in determining in good faith the applicatory law of that contract, was violative of the contractual liberty secured by the Fourteenth Amendment of the Constitution of the United States, and a federal question is thereby presented to this court.

The case as presented in the State Court involved both the construction and the constitutionality of the Missouri statute. It was there contended by this plaintiff in error, that the policy of insurance sued upon was governed by the New York law, the parties having expressly contracted with reference to that law, and that such agreement was made in good faith, not for the purpose of evading the Missouri law, but for the purpose of agreeing upon one applicatory law to govern engagements to which citizens of different States were parties. But it was also contended by plaintiff in error, the federal right being expressly set up in its answer, that if the statute was so construed as to deny the liberty of contract to the parties in this regard, it would be unconstitutional under the Federal as well as the State Constitution. The Supreme Court of Missouri, in directing judgment for the full amount claimed by defendant in error—(reversing the Circuit Court, which held that the policy was within the exception to the statute, in that it gave the insured the same *paid-up* value that the statute did)—necessarily and expressly decided both of these contentions against plaintiff in error. That is, that the policy was under the

statute and that it was a Missouri contract, being *made* so by the statute, which set aside the express agreement of the parties for the New York law. In other words the statute was read into the contract, *because* it was a *Missouri contract*, and it was made a Missouri contract *because* of the *statute*. Thus the court says (p. 57 of Rec.), referring to the case of Equitable Life Assurance Society vs. Clements, 140 U. S., 56, where the policy was held to be a Missouri contract upon the facts in evidence, there being no evidence of the acceptance of the application in New York, or of the agreement of the parties upon the applicatory law:

"It is true there was no express provision in the con-
"tract which formed the basis of the Clement suit, *supra*,
"as there is in the case at bar with respect to the State by
"whose laws the contract should be construed, or as to
"the place of contract; but defendant was at the time of
"the execution of the contract doing business in this State
"*ex gratia* and could not with respect to such business
"avoid the statute of this State, or withdraw itself from
"its operation by the insertion of clauses in its policy.
" * * * And p. 58:

"It is therefore concluded that the contract is a Mis-
"souri contract, governed by the laws of this State.

"Being a Missouri contract, the statute then in force
"with respect to the subject-matter of the contract entered
"into and became a part thereof as much as if copied
"therein."

The court thereafter holds (Rec., p. 64), after thus construing the statute, that it was not unconstitutional either under the State or Federal constitutions.

Assuming, therefore, as we are bound to do under the repeated decisions of this court, that the State court correctly construed its own statute and constitution, the statute so construed is violative of the liberty of contract guaranteed to this plaintiff in error, as to all other persons, by the Fourteenth Amendment of the Constitution of the United States, and the statute so construed is essentially

destructive of the principle of *mutual* life insurance, and *a fortiori* of *tontine* life insurance, which *requires* one applicatory law for administration, and this denial of the contractual liberty of the parties, and making a new contract for them, which they would not have made, was in effect an attempted regulation of commerce between the States, in violation of the Federal Constitution.

And the jurisdiction of this court is therefore invoked, on the ground that the statute as construed by the Missouri Supreme Court is violative of the federal rights thus duly claimed by plaintiff in error. The case of Allgeyer vs. Louisiana (165 U. S., 586), is directly in point. There the court accepted the construction of the Supreme Court of Louisiana of the statute, and held that *so construed* it was a violation of the fourteenth amendment of the constitution, in that it deprived defendants of their liberty without due process of law, in making insurance contracts with foreign insurance companies, the court saying:

"The statute which so forbids such an act does not "become due process of law, because it is inconsistent "with the Constitution of the Union. The liberty men- "tioned in that amendment means, not only that the citi- "zen shall be free from mere physical restraint of his per- "son, as by incarceration, but the term is deemed to "embrace the right of the citizen to be free in the enjoy- "ment of all his faculties; to be free to use them in all law- "ful ways; to live and work where he will; to earn his "livelihood by any lawful calling; to pursue any liveli- "hood or avocation, and for that purpose to enter into all "contracts which may be proper, necessary and essential "to his carrying out to a successful conclusion the pur- "poses above mentioned.

* * * "Such a statute as this in question is not "due process of law, because it prohibits an act which "under the Federal Constitution the defendant had a right "to perform."

The judgment of the Supreme Court of Missouri, reversing the judgment of the Circuit Court, remanding the case and directing the entry of judgment for a stated amount against plaintiff in error, was a *final* judgment within the meaning of the judiciary act. (See Mower vs. Fletcher, 114 U. S., 127.)

II.

The applicatory law of a contract is that with reference to which the parties contract, and in the case at bar the statute of New York was made the applicatory law of the policy by the express agreement of the parties.

Before considering the single ground upon which the statute thus construed is sought to be sustained, to-wit, as a consequence of the comity whereunder it is claimed plaintiff in error was permitted to do business in the State, it is proper to consider the fundamental rules whereunder the applicatory law of contracts between citizens of different jurisdictions is determined.

It will be conceded that the contract evidenced by this policy of insurance, as every other, must have one applicatory law whereby the rights and obligations of the parties to the contract are determined. This applicatory law is determined by the principles of private international law; and these principles are adopted by our common law, because in the language of Mr. Wharton (Wharton on Conflict of Laws, Sec. 1*a*): "Our common law incorporates the rules of private international law in all cases where they will apply."

There cannot be *two* applicatory laws determining the rights and obligations of the parties to the same contract. It is utterly inconceivable that defendant in error should have an *option* as to the applicatory law of the contract. He may elect as to his forum, says Mr. Wharton (Sec.

426, Wharton on Conflict of Laws), any jurisdiction as a rule, where the defendant or his property may be found.

"But as to the applicatory local law, according to "Savigny, the plaintiff has no election. There are no "two such statutes between which he may choose. It "would be gross injustice to the defendant, as well as a "discredit to the law itself, remarks this great jurist, if "such an election were allowed. Each case has, in right, "its own particular law which attaches to it when it arises "by the assent of the parties, which law continues always "to envelope it; and such law must be applied, as a gen-"eral rule, by every court to which the plaintiff may "appeal."

The fundamental rules of private international law, or conflict of laws, under which the applicatory law of contracts is determined, are well settled. In the absence of direct evidence of intention, a contract is held to be governed by the law of the place where made, as the parties are *presumed* to have contracted with reference to that law. (Story on Conflict of Laws, Sec. 272.) In many instances the law of the place of performance, the *lex loci solutionis* becomes applicatory law, because the parties are presumed to have contracted with reference to that law.

In other words, the applicatory law is applied according to the *presumed intent* of the parties. It was declared by Lord Mansfield in Robertson vs. Bland, 2 Burr, 1074, that "The law of the place can never be the rule where "the contract was entered into with the expressed view of "the law of another country as the law by which it was to "be governed."

And Phillimore, 4 Int., 469:

"It is always to be remembered that in obligations it "is the *will* of the contracting parties, and not the law, "which fixes the place of fulfilment; whether that law be "fixed by express words or decided by implication as the

"place of the jurisdiction to which the parties selected to "submit themselves."

Dicey, on Conflict of Laws, p. 567, says:

"When the intention of the parties to a contract, as to "the law governing the contract, is expressed in words, "this expressed intention determines the proper law of the "contract, and, in general, overrides every presumption."

And at page 560:

"The law of the place of contract, *lex loci contractus*, "and of the place of performance, *lex loci solutionis*, are "both of them presumptions grounded on the probable "intention of the parties."

The authorities on this subject are fully reviewed by this court in Pritchard vs. Norton, 106 U. S., 124 (see pp. 136 and 137.) The applicatory law, says the court, is that which the *parties* have either expressly or presumptively incorporated in their contract as constituting its obligation. It has never been better described than it was incidentally by Chief Justice Marshall in Wayman vs. Southard, 10 Wheaton, 1, where it is defined as a principle of *universal law*, the principle that in any other forum the contract is governed by the law with a view to which it was made.

In the absence of direct evidence of intention, courts must look into and give effect to the *acts* of the parties, in determining their presumed intent as to the applicatory law of a contract. Thus, in insurance cases, the place where the application was signed, where the application was accepted, of the countersigning by local agent, and the place of payment have all been given effect in determining therefrom the *situs* of the contract; but it has been uniformly held, in accordance with the rule relating to the formation of contracts by correspondence, that where the application is forwarded for acceptance in another State and there accepted, there being no power

in the local agent to complete the contract, that the place of the acceptance of the application is the place of the contract.

See:

Shattuck vs. Mut. Life Ins. Co., 4 Clifford, 598.

Desnoyes vs. Mut. Benefit Life Ins. Co., 7 Ins. Law J., 918; (3 Am. & Eng. Ency. of Law, 551).

Lamb, Assignee, vs. Bowser, 7 Bissell, 315.

Parkin vs. Royal Exchange Assurance Co., 8 Ct. of Sessions, 2nd Series, 465.

Russell vs. Mut. Benefit Life Ins. Co., 23 N. Y., 516.

Maiden vs. Ins. Co., 85 Iowa, 585.

In this last case it was held that although the plaintiff resided in Georgia, but the assured was a resident of Florida, that there was nothing to show that the parties contracted with special reference to the laws of Georgia, and therefore the law of New Jersey, the place of the company's office, was the applicatory law.

See also Hyde vs. Goodnow, 3 N. Y., 25.

In Parkin vs. R. Ex. A. Co., *supra*, a domiciled Scotchman made application for insurance through agents in Edinburgh to an English company and thereafter received the policy which was delivered through the Edinburgh agent, who collected the premiums. Lord Cockburn said: "I can scarcely conceive of a contract more devoid of Scotch features, or more deeply embraced with all the features of the laws of England." The English law was therefore held applicable, according to

which interest could be demanded upon the sum in the policy.

In Voorhees vs. Peoples Mutual Ben. Soc., (Mich.) 91 Mich., 469, the company, an Indiana company, denied liability because of non-compliance with the laws of Michigan. The by-laws endorsed upon the policy provided that it could have no force until approved by such examination at home office, and it was agreed in the application that "contract shall be considered as having "been entered into at Elkhart, Indiana, and shall be gov- "erned by and construed in accordance with the laws of "said State." The court held that this made the policy an Indiana contract, and that the law of Michigan did not apply.

In Griesmer vs. Mutual Life Ins. Co. of N. Y., 10 Washington, 203 (1894), where the policy provided that "it is a contract made and to be executed under laws of "State of New York, and shall be construed only accord- "ing to the charter of the company and the laws of that "State." The court held that it must be construed as executed and delivered in that State, although in fact it was issued upon application taken in another State and there delivered. The court saying, page 208:

"It is however within the power of contracting par- "ties, by the express terms of their contract, to establish "the place where it shall take effect, and under what laws "it shall be construed. If anything appears in the appli- "cation upon which this policy was issued, or in the "policy itself, that discloses an intention to locate the "contract in any other State than the one in which it was "actually made and delivered, *such intention must be given* "*force*, and if sufficient will have the effect, so far as the "construction of the contract is concerned, to change the "place of the execution to correspond with the intention "of the parties."

In Penn. Mutual Life Ins. Co. vs. Mechanics' Savings Bank and Trust Co., 6th Cir. U. S. Ct. of Ap., Feb. 4, 1896, (72 Fed. R., pp. 413, 414; 19 C. C. A., p. 286),

in a very learned and able opinion by Judge Taft, the court said:

"There can be no doubt that this policy is to be con-"strued according to the laws of Pennsylvania. It is "expressly provided in the application, which is made "part of the policy, 'that the place of contract shall be the "'City of Philadelphia, State of Pennsylvania.' In Way-"man vs. Southard, 10 Wheaton, 1–48, Chief Justice "Marshall stated it to be a principle of universal law, that "in every policy a contract is governed by the law, with "a view to which it is made. (See Pritchard vs. Norton, "106 U. S., 124–136; 1 Sup. Ct., 102, and cases cited.)"

In Washington Central Bank vs. Hume, 128 U. S., 195, there was involved the distribution of the proceeds of a policy issued by a Connecticut company to a citizen of Washington. It was expressly provided as a part of the contract that the policy was issued and delivered at Hartford, in the State of Connecticut, was to be in all respects construed and determined in accordance with the laws of that State. The court said:

"The rights and benefits given by law of Connecti-"cut are as much a part of these contracts as if incorpor-"ated therein, not only because they are to be taken as if "entered into them, but because that was the place of "performance, and the stipulation of the parties was made "with reference to the laws of that place."

There is nothing in the case of Insurance Society vs. Clements, 140 U. S., 226, contrary to this fundamental principle. There the court held the contract *under the facts in evidence*, there being no evidence of the acceptance of the application in New York, and no express agreement of the parties as to the applicatory law, to be a Missouri contract, and the Missouri statute was held applicable, because the policy was a Missouri contract. In other words, the principles of universal law were applied to the facts of the case, and therefrom the intent

of the parties as to the applicatory law was presumed. This is the view taken of this case in Equitable Life Assurance Society vs. Nixon, 26 C. C. A., 620, 81 Fed. Rep., 796, where there was no express agreement upon the New York law, but the proof showed that the risk attached with the acceptance of the application in New York, and the court held that it was a New York contract, and the New York notice law was enforced against the company, the court saying "there was nothing to the "contrary in the case of the same company vs. Clements, "140 U. S., 226, so much relied on by the defendant."

In Liverpool Steam Company vs. Phoenix Insurance Company, 129 U. S., 397, the decisions as to the situs of contracts are exhaustively reviewed and the court said (page 447):

"The general rule as to what law should prevail, in "case of a conflict of laws concerning a private contract, "was concisely and exactly stated before the declaration "of independence by Lord Mansfield (as reported by Sir "William Blackstone, who had been of counsel in the "case) as follows: 'The general rule, established *ex com-*"*itate et jure gentium*, is that the place where the contract "is made and not where the action is brought, is to be "considered in expounding and enforcing the contract. "But this rule admits of an exception, when the *parties* "(at the time of making the contract) had a view to a "different kingdom. Robinson vs. Bland, 1 W. Bl., 234, "256, 258; S. C., 2 Burr, 1077, 1078.'"

The English cases were reviewed and the general rule as summed up by the Court of Appeal in England is given as follows:

"The broad rule is that the law of a country where a "contract is made, presumably governs the nature, the "obligation and the interpretation of it, unless the con-"trary appears to be the *express intention* of the parties." 12 Q. B. D., 556, 597, 600. And continued:

"This court has not heretofore had occasion to con-"sider by what law contracts like those now before us

"should be expounded. But it has often affirmed and "acted on the general rule, that contracts are to be gov- "erned, as to their nature, their validity and their inter- "pretation, by the law of the place where they were made, "unless the *contracting parties* clearly appear to have "some other law in view."

In Coglan vs. S. Carolina R'd Co., 142 U. S., the court reaffirmed this principle of universal law in emphatic terms, saying (p. 109):

" All the terms of the contract must be examined, in "connection with the attendant circumstances, to ascer- "tain what law was in the view of the parties when the "contract was executed. For, as said by Chief Justice "Marshall in Wayman vs. Southard, 10 Wheat., 1, 48, it "is a principle, universally recognized, that 'in every " 'forum a contract is governed by the law with a view to " 'which it was made.' And by Lord Mansfield in Rob- "inson vs. Bland, 2 Burrow, 1077, 1078: 'The parties " 'had a view to the law of England. The law of the " 'place can never be the rule when the transaction is " 'entered into with an express view to the law of another " 'country as the rule by which it is to be governed. " 'Now here the payment is to be in England; it is an " 'English security, and so intended by the parties.' "Referring to these and many other causes, this court, "speaking by Mr. Justice Matthews, held, upon full con- "sideration, in Pritchard vs. Norton, 106 U. S., 124, "136, that the law upon which the nature, interpretation "and validity of a contract depended, was that which the "parties, either expressly or presumptively, incorporated "into it as constituting its obligation. This doctrine was "reaffirmed in Liverpool, etc. Steam Co. vs. Phœnix "Ins. Co., 129 U. S., 397, 458, where it was said that, "according to the great preponderance, if not the uniform "concurrence of authority, the general rule was, 'that the " 'nature, the obligation and the interpretation of a con- " 'tract are to be governed by the law of the place where " 'it is made, unless the parties at the time of making it " 'have some other law in view.' The elaborate and "careful review of the adjudged cases, American and

"English, in the two cases last cited, leaves nothing to be "said upon the general subject."

III.

This principle of universal law, that the applicatory law of an inter-state contract is that with reference to which the parties have contracted, has been uniformly adopted and enforced by the Federal Courts and the courts of the different States against life insurance companies doing business therein, construing the provisions of the statutory law of the State of incorporation as entering into the policy contracts of the parties.

This has been notably illustrated by the decisions involving the so-called notice law of New York, which has been considered by this court in a recent case, Mutual Life Ins. Co. vs. Phinney. This statute, it will be remembered, required notice from the company to the insured before a forfeiture could be made for non payment of premium, this statute being applicable by its terms to life insurance companies, "doing business in New York."

In several cases, the United States Court of Appeals for the Ninth Circuit, has held that policies issued by New York companies in the States in that circuit were New York contracts, and the New York notice law was applied, because the parties were held to have contracted with reference to the New York law, this ruling being made, even where there was no express agreement upon the New York law, as in the case at bar.

Equitable Life Assurance Soc. vs. Nixon, *supra*.

Equitable Life Assurance Soc. vs. Trimble, 27 C. C. A., 404.

Mutual Life Ins. Co. vs. Phinney, *supra*, now pending in this court.

And again in a very recent case, the same court, in Mutual Life Insurance Co. vs. Hill, 97 Fed. Rep., 263, reaffirmed its ruling, saying:

"It is contended by the plaintiff in error that the "court erred in holding that the contract is to be governed "by the statute of the State of New York. This question "is not a new one in this court. It has been often before "presented, discussed, construed and decided (Society "vs. Nixon, 26 C. C. A., 620, 81 Fed. Rep., 796; same "vs. Trimble, 27 C. C. A., 404) after due deliberation "upon the facts and careful examination of the authori- "ties, this court arrived at the conclusion that the contract "there in question which in so far as legal principles are "involved, cannot be distinguished from the facts in this "case, and was a New York contract." Citing in support thereof Wayman vs. Southard, 10 Wheat., 48; Pritchard vs. Norton, 126 U. S., 131–141; Bank vs. Hume, 128 U. S., 206; Coglan vs. Railroad Co., 142 U. S., 101–109; Hall vs. Cordenn, 142 U. S., 116 and 120.

The court held, further, that this provision of the New York law, thus entering into the contract, could not be waived by the parties, and said:

"Entertaining no doubt of the correctness of the con- "clusions therein reached, we respectfully decline to "further discuss the same identical questions. It is enough "to say that we adhere to the view there expressed."

It was held, further, that it was not necessary for the plaintiff to set up the New York statute, as the United States courts took judicial notice of all public statutes of the States.

In the case of New York Life Ins. Co. vs. Dingley, in the same court, 35 C. C. A., 245, the policy, similar to one here in suit, was assumed to be a New York contract, and the notice law of New York was construed and applied.

Also in the Sixth Circuit, in the case of McConnell vs. Provident Savings Life Association, 34 C. C. A., 663,

it was assumed that the policy was a New York contract and governed by the law of New York.

The same statute was construed and applied to a policy, as a New York contract, by the same court in Rosenplanter vs. Provident Savings Life Association, 37 C. C. A., 566. This was a bill in equity to correct the date in a life insurance policy, on the ground of an alleged mutual mistake, for the purpose of invalidating the notice given under the New York law. The court, in its opinion by Taft, J., construed and applied the New York law, saying, "under the law of New York, by which "this policy, in accordance with its terms, was con- "strued," complainant failed to make out his case.

In Hathaway vs. Mutual Life Ins. Co., in the Circuit Court for the District of Washington, 99 Fed. Rep., 534, in a decision rendered January 2, 1900, the court, following above cases and distinguishing Rosenplanter vs. Insurance Co., *supra*, applied and enforced the notice law of New York, and said:

"The contract is a New York contract to be per- "formed in the State of New York, and as to all rights "and liabilities of the parties, the law of the State of New "York must govern."

The State courts have, without exception, made the same ruling. Thus, the Supreme Court of California, in Griffith vs. N. Y. Life Ins. Co., 101 Cal., 607, and in Harrington vs Insurance Co., 58 Pac. Rep., 180, where the court says the insurance company is located in the State of New York, and it is agreed that the policy is a contract which was to be performed in that State, and then proceeds to consider and apply the New York statute. Also in Osborne vs. Home Life Ins. Co., 123 Cal., 610, where the opinion assumes the New York law to apply, and follows the construction given by the New York courts to the New York statute.

In Washington, in the case of Trimble vs. Insurance Co., 20 Wash., 386.

In Minnesota, in the case of Banholzer vs. N. Y. Life Ins. Co., 74 Minn, 387, where plaintiff also claimed under the notice law of New York, the opinion of the court by Mitchell, J., construed the policy as a New York contract, saying with reference to the same form of policy as that involved in this case: "The parties mutu-"ally agree that this shall be deemed a New York con-"tract according to the laws of that State. The decisions "of the highest courts of that State as to the construction "of such contracts, and of the statutes of New York "must, therefore, be accepted as conclusive upon the "parties," The court, then, considers the New York decisions, and holds plaintiff's contention thereunder untenable.

In Tennessee, in Nall vs. Insurance Co., 54 S. W. R., 109, where the court said: "We think there is no "doubt that the New York statute, being in force at the "time the policy was issued, became part of the contract "and governed its provisions."

Also in Illinois, in Equitable Life Assurance Soc. vs. Trombold, 75 Ills. App., 43, where there was no express agreement as to the New York law, as in the case at bar, the policy was held to be controlled by the New York statute, and the New York notice law was enforced against the company, the court saying that there was evidence tending to show that the parties contracted with reference to the law of New York.

Also in Texas, where the Supreme Court, in Mullen vs. Insurance Co., 89 Texas. 261, said: "We think the "provisions of the New York statute, under the facts "shown in this case, entered into and became a part of "the contract between the parties."

The Court of Civil Appeals, in the same State, applied and enforced the New York statute against this

plaintiff in error, in Smith vs. New York Life Ins. Co., 41 S. W. Rep., 680.

In Iowa, April 8, 1899, in case of Johnson vs. this plaintiff in error, 78 N. W. Rep., 905, in a suit on a defaulted life policy containing the *same stipulation* for the New York law as the one at bar, and claimed to have been kept in force by the New York notice law, the court construed and applied the New York law, saying:

"The defendant company was duly incorporated "under the laws of the State of New York, and the policy "was issued in that State, and by the terms of the appli- "cation the contract was to be construed by the laws "thereof. It was, *therefore*, a New York contract." Citing Wayman vs. Southard, 10 Wheat., 48, and Bank vs. Hume, 128 U. S., 195.

In a few of the above cases the plaintiffs failed in their contention, but in *all* of them—and we find no rulings to the contrary—the policies were held to be New York contracts because the parties were held to have contracted with reference to the laws of New York, and the New York notice law was construed and applied against the company.

The same principle has been applied in all cases, both in the State and Federal courts, where the statutory law of the State of incorporation or the charter of the company has been invoked by plaintiffs in suits against life insurance companies, and that on the theory that the parties have either expressly or impliedly contracted with reference to such law.

Thus in Maryland, in Insurance Co. vs. Ficklin, 74 Md.. 172, where suit was brought on policy issued by a Pennsylvania company to a resident of Virginia, the plaintiff invoked and the court applied and enforced the provisions of the Pennsylvania law against the company, saying:

"Everywhere, within and without the State which

"created it, its contracts are limited, construed and sus-"tained in accordance with the laws that affect its opera-"tion."

In Texas, in a very recent case—Seiders vs. Merchants' Life Ins. Ass'n, 54 S. W. Rep., 753—the Supreme Court of that State, reversing the Court of Civil Appeals, which held that the Missouri law did not apply to contracts delivered in Texas (51 S. W. Rep., p. 547), in a suit against a Missouri life insurance company doing business in Texas, held that the provisions of the Missouri law declaring that representations should not be deemed warranties unless material to the risk, entered into the contract and was the law governing the same, saying:

"Unless there be something in the circumstances "which indicated that the parties contracted with refer-"ence to the law of Texas, the legal effect of the contract "must be determined according to the laws of the State "of Missouri."

The opinion in this case is notable as applying the analogy of interstate contracts with reference to the usury laws of different States, which will be hereafter considered, holding that the same principle applied to interstate insurance contracts.

The same principle was applied by the Court of Appeals of the Second Circuit, in American Credit Indemnity Co. vs. Carrolton Co., 36 C. C. A., 671. This was a suit on a policy of indemnity against business losses issued by a New York company, on an application made in Kentucky. In the latter State there is a statute making warranties in all insurance policies mere representations, and in a suit upon the policy in New York this statute was sought to be applied. But the court held that the policy was a New York contract and that the Kentucky statute did not apply, for the same reason that the Supreme Court of Texas held that the Missouri statute did apply, the court saying in its opinion:

"This statute seems to have been held by the Ken-"tucky Court of Appeals to relate to statements in an "application, irrespective of the fact that it had been "agreed by the parties that they were warranties. The "application in this case was made in Kentucky, and was, "when made and signed, simply a proposition for a bond "of indemnity or policy of insurance. It was sent to New "York, the proposition was accepted, and a contract of "indemnity was thereupon made and executed in New "York, and was presumably returned to the other con-"tracting parties in Kentucky. No fact is disclosed "which tends to show that the place of performance was "to be in Kentucky. We see no reason why the provis-"ions of a statute of Kentucky should be imported into a "contract known by both parties to be made in New York, "and so far as payment by defendant is concerned to be "performed in St. Louis or New York. It was when made, "a *commercial instrument*, and is to be construed in "accordance with the principles of *commercial law*, unless "there are statutes of the State of New York which con-"trol its construction." Citing: Hyde vs. Goodnow, 3 N. Y., 266; Western vs. Ins. Co., 12 N. Y., 258; Scudder vs. Bank, 91 U. S., 406.

It should be observed that in all of these States where the Federal and State courts have thus united in holding that the policies of the companies doing business therein are controlled by their respective charters, there are insurance departments regulating the business of life insurance, whereunder licenses are granted to foreign companies, substantially the same in general statutory regulation, as that in force in the State of Missouri. See Revised Statutes of Texas of 1895, Title LVIII, Chapter 2; Code of State of Washington, 1895, Chapter 188; Code of Tennessee, 1884, Sections 2517 to 2584; California Political Code, 1897, Sec. 564; Minnesota, 1 General Statutes, 1891, Sec. 2920.

Thus we have this anomalous situation, for which we submit there is no precedent in our jurisprudence. An interstate life insurance contract made by a company

incorporated under one State with a citizen of another State where it is doing business, is subject to *two* applicatory laws, that of its Home Office and that of the residence of its policy-holder, the applicatory law to be selected at the *option* of the policy-holder as it suits his convenience and the purposes of the litigation.

When a policy-holder makes default on his policy, he thus has the option of considering whether it is better for him to declare his policy a Missouri contract and invoke the Missouri non-forfeiture law, on the ground declared by the Missouri court in this suit, that the statute *ex proprio vigore* makes the contract a Missouri contract, because the company does business in the State; or, *at his option*, if he concludes that there has been some defect in the service of notice under the New York law, he can declare that the contract is a New York contract because the company and himself contracted with reference to that law, thus invoking the principles of universal law, and according to the doctrine of all cases in Federal and State courts cited above, he can recover on that ground!

We have an interesting illustration of this anomalous situation in the recent case of Linn against this same plaintiff in error, 78 Mo. App., 192, decided by the Court of Appeals of Missouri. There the plaintiff did this very thing, claiming to find that there was some defect in the service of notice of forfeiture, she pleaded the New York statute as a part of the contract, and the court applied and construed it, following the decisions of the New York courts as to the construction of the statute, by holding that plaintiff had failed to make a case thereunder!

In the case of the very policy here in suit, if the defendant in error had claimed the policy to be a New York contract and the company had failed to prove that the notice required by the New York law had been served, according to the cases above cited she could have recovered on that theory.

Rorer says, Interstate Law (2nd Ed.), pp. 110, 111:

"When parties contract with reference to the laws of "a particular State, it is proper that those laws should "govern their contract, in whatever form the contract is "construed or litigated upon. Those laws form an "integral part of their contract, and as a general rule, to "hold otherwise, would be a breach of State comity, and "the precursor of *much confusion*."

We quote again from Wharton (Conflict of Laws, 2nd Ed., Sec. 427):

"But as to the applicatory local law, according to "Savigny, the *plaintiff has no election*. There are no "two such statutes between which he may choose. It "would be a *gross injustice* to the defendant, as well as a "*great discredit* to the law itself, argues this great jurist, "if such an election were allowed. Each case has, in "right, its own particular law which attached to it when "it arose, by the assent of the parties, which law con- "tinues always to envelop it; and such law must be "applied, as a general rule, by every court to which the "plaintiff may appeal."

IV.

Parties to an interstate contract may contract in good faith for the law of the State of either and the law thus agreed upon will be enforced in the other State as the law of the contract, although the domestic law of such State, which but for such agreement would have been the law of the contract, may be incapable of waiver. This is clearly illustrated in the case of usury laws in interstate contracts.

The failure to apprehend the distinction between the contracting in good faith for the foreign law, and the *waiver* of a domestic law, is the fallacy which underlies defendant in error's entire contention.

This position, as we understand it, is that such an agreement for a foreign law in an insurance contract,

whether made in good faith or not, and in accord with the nature of the contract itself, is necessarily invalid, as an attempt to evade the laws of the State, and that the Missouri statute applies, although it clearly appears that the parties would not have contracted under that statute, and that its obligation and enforcement are at variance with the principle of mutuality which inhere in the very basis of the contract itself.

The fallacy of the position is the failure to apprehend the very obvious distinction between an attempt to waive a statute by those who are subject to it, and an agreement by parties who are severally subject to separate sovereignities, contracting in good faith with reference to the laws of one of them.

The distinction cannot be better illustrated than in the matter of *usury* laws. These are enacted from considerations of public policy as ancient as our civilization, and obviously cannot be waived by any private agreement, yet it is Horn Book law, that citizens of different States, in a promissory note, or other contracts, may agree upon the rate of interest permitted by either, and the agreement will be enforced *ex comitate*, though the rate thereby agreed upon is in violation of the laws of the country where it is sought to be enforced. All that is required is that the agreement shall be made in good faith, and not as a mere cover of an attempt to avoid the usury laws of the State where the contract is made.

Freeland vs. Hern, 7 Cranch, 147.

Andrews vs. Pond, 13 Peters, 65.

Miller vs. Tiffany, 1 Wallace, 298.

Johnson Bank vs. Bank of Ashland, 12 Wallace, 266.

Story on Conflict of Laws, Sections 304 A & B.

In Andrews vs Pond, Taney, C. J., said:

"The general principle in relation to contracts made "in one place to be performed in another is well settled. "They are to be governed by the law of the place of per- "formance, and if the interest allowed by the law of the "place of performance is higher than that permitted at "the place of contract, the parties may stipulate for the "higher interest without incurring the penalties of usury."

This fundamental doctrine of private international law is thus stated by the Supreme Court of Illinois, McAllister vs. Smith, 17 Ills., 328, 65 Am. Decisions, 651:

"The contracts were made in this State and the laws "of this State would, had the parties been silent, have "become part of the contract for the contraction and "meaning of the parties in ascertaining and fixing their "mutual rights and obligations. But parties may substi- "tute the laws of another State and country than that "where the contract was entered into, both in relation to "the legality and extent of the obligation, and in relation "to the respective rights of the parties, for a breach or "violation of its terms."

See 2 Kent's Com., 13th Ed., p. 459.

In Smith vs. Parsons, 55 Minn., 520, the court, in determining whether the law of Connecticut or Minnesota applied on question of usury, said, p. 520:

"It is in accord with the weight of authority and with "principle, that where two parties make a contract of "loan in one State to be performed in another, they *may*, "*acting in good faith, and without intent to evade the laws* "*agree that the law of either State shall control as to the* "*rate of interest*. 2 Kent Com., (12th Ed.) 460; Robin- "son vs. Bland, 2 Burrows, 1077; Miller vs. Tiffany, 1 "Wall, 298."

The court says that it is often a matter of great nicety to determine the applicatory law, and parties should therefore determine that for themselves, and this makes

it unnecessary for the court to determine by the law of which State it would have to be decided, had they not so agreed.

Smith v. Muncie National Bank, 29 Ind. 158, was an action upon a bill of exchange drawn in Muncie, Ind., upon the appellant in Cincinnati, Ohio, payable in that place, and accepted by him. The appellant answered, among other things, that the appellant accepted the bill of exchange for the accommodation of the drawers and the first endorser thereof, and that said bill was usurious under the laws of Indiana, and was made payable in Ohio "to evade the statute of Indiana, and to defraud said defendant." To this a demurrer was sustained. The court said:

"Does, then, the averment, that for the purpose of "evading" or escaping from the force of the usury laws "of this State, and the securing of a higher rate of interest under the laws of another State, the bill was made "payable in the latter State, amount to an allegation that "the bill was usurious? We think not. This averment "does not deny that it was the intention of the parties that "the contract should be executed in Ohio, in good faith, "and we do not see why the laws of a sister State may "not be taken advantage of by citizens of our own State, "when, with whatever motive, they elect to make that "State the place for the performance of any contract into "which they may enter. It has been held that for the "purpose of giving a special court jurisdiction of a cause, "a party may change his residence, and we see no reason "why, in order to avail himself of the laws of a particular "locality, he may not select the place of the performance "of a contract; of course, the purpose must be to require "the discharge of the contract at that locality."

In Hubbell vs. Morristown Land and Imp. Co. (Tenn.) 11 Pickle 585, the note was executed by a Tennessee company in North Carolina where its president resided, but was made payable in New Jersey, where plaintiff resided, but was delivered in Connecticut, where

he was visiting. Held, in absence of evidence that parties contracted with reference to laws of either of the other States, the laws of place of payment, New Jersey, was the applicatory law, and note was therefore usurious.

The principle is, of course, subject to the qualification that the contract does not involve a *malum in se*, or be founded on moral turpitude; but the fact that there is a *difference* in the law in the two sovereignties, merely presents a case of *conflict of law*, and the intent of the parties must be clearly expressed or implied in selecting the applicatory law. If there was no difference in the law, there would be no occasion for the rules of private international law, or for what Dicey calls the "choice of law." (Conflict of Laws, p. 472,*et seq*).

It necessarily follows, therefore, that the assertion on which plaintiff's entire position is based, that the agreement of the parties in the case for the New York law, was necessarily invalid as an attempt to *evade* the Missouri law, ignores this principle of private international law. A cannot contract with B to *waive* the usury laws of Missouri, but A in Missouri can contract with B in Denver for the rate of interest permitted either by the Colorado or Missouri law.

The law as stated by Mr. Parsons is as follows:

"If a note be made *bona fide*, in one place, expressly "bearing an interest legal there, and payable in another "place, in which so high a rate of interest is not allowed, "it may be sued in the place where payable, and the inter-"est expressed recovered. Because the parties had their "election to make the interest payable according to the "law of either place; or to express the same thing differ-"ently, they may lawfully agree upon the highest interest "allowed by the laws of either place, or any less interest." 2 Parsons on Contracts, page 95.

In U. S. Savings and Loan Association vs. Shain, 77 N. W. R., 1006, 1898, the Supreme Court of North Dakota in a very recent case, says:

"Parties were residents of different States. It was "entirely competent for them, then, to contract under the "laws of either. They expressly agree both in the note "and mortgage that they contracted under the laws of "Minnesota, the State of which appellant is a resident. "That agreement is binding."

In a recent case in the Circuit Court of Appeals for the Ninth Circuit, Dygert vs. Loan and Trust Co., 37 C. C., A. 389, the court holds, quoting from the opinion in Andrews vs. Pond, *supra*, that plaintiff was not required to allege in his petition to recover on a note which was made payable in a different State, that it was so made for convenience and in good faith, and not to evade usury laws.

This principle was recognized by the Supreme Court of Missouri in Bank of Louisville vs. Young, 37 Mo., 407. In Phœnix Mutual Life Insurance Company vs. Simons, 52 Mo. App., 357, a contract made by a married woman, who was then in Missouri under common law disability, with a foreign corporation, was enforced because the court held that the contract was made with reference to the Kansas law, where she was competent to contract: and thus a married woman in the courts of Missouri was compelled to pay a note bearing twelve per cent. interest, because such note and such interest were valid under the laws of Kansas. This note was held to be a Kansas contract because, although signed at Nevada in Missouri, it was delivered to plaintiff's agent at Fort Scott in Kansas, who made the loan, the soliciting agent in Missouri being held to be a mere middle man through whom the parties negotiated.

There is no pretense in this case that the New York law, for which the parties contracted, is against good morals or religion, or that the contract is founded upon moral turpitude which, under the recognized limitations of the law of comity, would prevent the courts of this State

from enforcing it. The only claim is that the law of Missouri is *different* from the law of New York; but this as already seen, is the case, wherever it is necessary to apply the rules of private international law.

The very recent case decided by the Supreme Court of Texas of Seiders vs. Merchants Life Association, *supra*, is strikingly illustrative of the analogy of usury laws in interstate contracts to interstate insurance contracts. A Missouri life insurance company doing business in Texas being sued upon a policy, set up the alleged falsity of statements in the application, to which plaintiff replied setting up the provisions of the Missouri statute, that misrepresentations should not be material, unless actually contributing to the loss. The policy was payable at the Home Office of the company and all premiums paid there, although there was no express agreement upon the Missouri law, and there was a statute in Texas providing that insurance companies as a condition of doing business shall appoint an office and have an agent in Texas, and there were other provisions in the Texas statutes regulating the business of insurance. But the Supreme Court, reversing the Court of Appeals, held that the contract was nevertheless a Missouri contract, applying the analogy of cases involving the usury laws above cited, and said: "Unless there can be something in the "circumstances which indicate that the parties contracted "with reference to the laws of Texas, the legal effect of "the contract must be determined according to the laws "of the State of Missouri," citing Story on Constitutional Law, 280 Note a; Andrews vs. Pond, 13 Pet., 65; Railroad Co. vs. Bank, 12 Wal. 226; Lewis vs. Hedley, 36 Ill., 433; Bank vs. Hall, 150 Pa., 4661; Ryan vs. Railroad Co., 65 Texas, 13.

It is the failure to make this distinction between the contracting in good faith for a foreign law and the attempted waiver of a domestic law enacted from consid-

erations of public policy which has misled the Supreme Court of Missouri in its citation of the decision of this court in Insurance Co. vs. Clements, *supra*, as authority for the decision in this case. In the Clements case, the contract was held upon the facts under the rules of private international law, to be a Missouri contract. Being a Missouri contract, the Missouri law entered into it, as the parties were conclusively presumed to have contracted with reference to it; and as the law was enacted from considerations of public policy, it was held to be incapable of waiver by the parties.

But the case at bar is not the attempted waiver of a domestic law, but the agreement in good faith upon the applicatory law of an interstate contract, being the law of the State of the Home Office of the company, with reference to which all of the engagements of the company were made.

V.

Qualifications, to which the choice of applicatory law of contract is subject.

This principle of universal law whereunder parties to an interstate contract involving a choice of laws may select the applicatory law, is subject to two qualifications:

(*a*) That the choice is made in good faith and in furtherance of the purposes of the contract, and not as an evasion of the local law; and

(*b*) That the foreign law agreed upon must not be prejudicial to the interests of the State where sought to be enforced, or violative of its public policy.

These qualifications are obviously inherent in the right of choice of the applicatory law of a contract when a foreign law thus selected is sought to be enforced in the courts of any State. It is now proposed to consider these in their order and to show that under the conceded facts:

First. The selection of the New York law as the applicatory law of the interstate contract of insurance evidenced by the policy in suit, was reasonable and in furtherance of and necessitated by the purposes of the contract, and was in no wise an attempted evasion of the laws of Misssouri.

Second. That this selection of the New York law was necessitated by the nature of the contract and the plan of insurance embodied therein, whereunder the other members of the tontine class acquired interests therein, in consideration of the contingent interests enjoyed by the insured during his life in the policy contract of his associates in the same class.

Third. That as the selection of the New York law was necessary to the contract made by the parties, it follows that even if there had been no express selection of the New York law, the parties would be presumed to have contracted with reference to that law.

Fourth. This selection of the New York law being in furtherance of and necessitated by the contract, was in no wise prejudicial to the interests of the State of Missouri, or violative of its public policy. Considering these in their order:

VI.

The selection of the law of New York as the applicatory law of the interstate contract evidenced by the policy in suit, was reasonable and in furtherance of and indeed necessitated by the purposes of the contract, and was in no wise an attempted evasion of the laws of Missouri.

The agreement must be made in good faith and in furtherance of the purposes of the contract. Thus in the case of usury laws, while the parties to an interstate contract may contract with reference to the laws of either State, it is clear that they cannot contract for the law of

any other State than one of the jurisdictions to which they are severally subject, or with reference to which the contract is made. In the case at bar, the very nature of the engagement rendered the selection of the New York law as the applicatory law of the contract essential to the purposes of the contract.

"The law defining the insurance engagements is that "of the place where the corporation issuing the policy has "its seat; and where the loss, if it be incurred, is to be "paid. When the policy is procured by correspondence, "or through the action of an agent, this rule obtains, in "all cases in which the agent has no power to conclude "the insurance, but refers the matter to the principal for "decision."

Wharton on Conflict of Laws, Sec. 465, 2d. Ed.

Defendant is a *mutual* life insurance company. It has no capital stock. Its policy-holders reside not only in the different States and Territories of this country, but in foreign countries, It is agreed, and, indeed, the court will take judicial notice of the fact, without any proof, that such a company essentially consists of the administration of a trust fund, made by its current and accumulated premiums paid in for the exclusive benefit of its policy-holders paying the premiums, less the expenses of administration. The members constitute a society, and each member is at once insurer and insured, entitled to participate in the management and share in the profits in proportion to his interest. See 2 May on Insurance, 2d Ed., Sec. 568.

The essential feature of the administration of such a fund is *equality* between the beneficiaries; and discrimination between them, *i. e.*, between the different policy holders of the same class, is fatal to the principle of mutuality.

As the policy-holders, the sole beneficiaries of this trust fund, which is based on the scientific averaging of

the expectancy of human life, reside in different States, the necessity for a uniform law for the administration of the trust inheres in its very nature. Such uniform law is demanded precisely as in the case of the administration of the Peabody trust fund, or of any other private trust. It is eminently proper, therefore, and in furtherance of the beneficent purposes of the trust, that the scattered beneficiaries, residents in different States, should contract for, and with reference to, a *uniform law* for the administration of the trust. The right of the beneficiary in Missouri in the administration of this trust must be determined by the same law as those of his fellow-beneficiaries, resident in other States and countries.

The only uniform law, which could be applied, is that of the seat of the trust itself, the chartered domicile of the trustee.

The trustee may be subjected to individual actions in different sovereignties where it does business, but the law of the domicile of the corporation is necessarily the law of the trust and the only law whereunder that trust can be administered and liquidated. In the language of this court in Relfe vs. Rundle, 103 U. S., 226, "Every person "who deals with it everywhere is bound to take notice of "the provisions which have been made in its charter for "the management and control of its affairs, both in life "and after dissolution." See also Smith vs. Mutual Life Ins. Co., 14 Allen, 336.

The essential nature of life insurance, and a *fortiori*, that of *mutual* life insurance, is clearly shown by Bradley, J., in the opinion of the Supreme Court in N. Y. Life Ins. Co. vs. Statham, 93 U. S., 31:

"The insured parties are *associates in a great scheme*. "This associate relation exists, whether the company be "a mutual one or not. Each is interested in the engage- "ments of all, for out of the co-existence of many risks "arises the law of average, which underlies the whole "business. An essential feature of this scheme is the

"mathematical calculation referred to, on which the pre-"miums and amounts insured are based. And these cal-"culations again are based on the *assumption of average* "*mortality*, and of prompt payments, and of compound "interest thereon."

The stipulation for a uniform applicatory law for the administration of this mutual trust fund, was not only reasonable, but necessitated by the very nature of the trust created by these contracts. Clearly the insured in this policy would have been held entitled to all the benefits secured to him under the New York law under his contract of membership, and, as already seen, the existence of an *option* in the insured to select the applicatory law of the contract is wholly anomalous and inadmissable.

VII.

The selection of the New York law as the applicatory law of the contract was necessitated by the nature of the contract and emphasized by the plan of insurance embodied therein, whereunder the other members of the tontine class acquired interests therein in consideration of the contingent interest enjoyed by the insured during his life in the policy contracts of his associates in the same class, and defendant in error as his representative, is therefore now estopped from asserting any other or different claim from that fixed under the law thus selected.

The application of this tontine principle to life insurance extends and emphasizes the *mutuality* incident to all life insurance. It is a known and judicially recognized system, being defined in the Century Dictionary (under head "Tontine") as follows:

"A policy of insurance, in which the policy-holder "agrees in common with the other policy-holders under "the same plan that no dividend, return premiums, or sur-"render value shall be paid for a term of years, called "the tontine period, the entire surplus from all sources

"being allowed to accumulate to the end of that period, "and then divided among all who have maintained their "insurance in force. This modification of ordinary life "insurance has been adopted, as optional with the insured, "for the purpose of countervailing the tendency to burden "long-lived and persistent policy-holders with a large "amount of premiums in comparison with those whose "lives fall in shortly after obtaining insurance."

The New York Court of Appeals in case of Bogardus vs. Ins. Co., 101 N. Y., 329, speaking of the tontine plan of life insurance, says:

"It contemplates the *union of the interests of a large "number of persons and the administration of a fund*, for "their mutual benefit, and from its very nature, is incapa- "ble of being molded and managed to meet the special "requirements of particular individuals. * * * '*Upon* " '*the accession of any person to this class he becomes inter-* " '*ested in the contributions of every other member, and* " '*neither of them can afterwards withdraw his contribu-* " '*tion without injury to the rights of all others interested* " '*in the fund.*' "

It is too clear for argument, that the very conception of this plan of insurance involves and necessitates a *uniform law* for the administration of this tontine fund, to which the survivors of the class are entitled, and in which each policy-holder of the class has an interest, contingent upon survivorship. The insured, and defendant in error, acting through him, deliberately selected this form of insurance, and asked admission into this class. The non-forfeiture feature set out in this policy was an essential part of this plan of insurance; and special notice was given, that unless it was agreed to, *the policy would not be issued*. As shown by the agreed statement (Sec. 14), the total number of members of the same tontine class was 5172, with policies aggregating $20,154,981. The insured and defendant in error enjoyed the benefits of this class, permitting during that year others to enter on faith of

this and similar contracts, holding the contingent right of survivorship, and defendant in error claims the right to repudiate this engagement, and to deprive her fellow-beneficiaries of a portion of the trust fund which is held for their benefit. Although the relation between plaintiff and defendant is primarily one of contract, it is nevertheless true that the defendant company is in reality only a trustee in such a contest as this, asserting, as it is bound to do, the integrity of the trust, which it is administering. The claim asserted by plaintiff is in effect against surviving members of the tontine class, her fellow beneficiaries; whatever she recovers over the amount tendered, fixed by the contract, is recovered from *them*, in violation of her agreement, whereon they have relied in making their payments.

It is unnecessary to do more than invoke the elementary principle of *estoppel*, resting on inherent justice, to show that such a claim as that now asserted cannot be sustained. The doctrine of estoppel has been frequently applied against insurance companies in favor of policy claimants—here it is invoked in favor of policy-holders, members of a specific class, for protection against impairment of a fund, created by their own and the insured's solemn engagement.

VIII.

As the selection of the New York law was necessary to the contract made by the parties—that is, to the tontine plan of insurance duly selected and adopted—it follows that even if there had been no express reference to the New York law, the parties would be presumed to have contracted with reference to that law.

In the language of Phillimore, adopted by this court in Pritchard vs. Norton, *supra*, it is the *will* of the contracting parties, and not the law, which determines the

place of the jurisdiction to which the parties select to submit themselves. In the case at bar, there is an *express* reference to the law with reference to which the parties contract, and it is unnecessary, therefore, to consider what the law would *presume* as to their intent.

But if there had been no express reference to the New York law, the fact that this law is essential to the tontine plan of insurance selected and adopted by the parties, would be conclusive that this was the law with reference to which the parties contracted. It is the fundamental principle of private international law that when there are two conflicting laws, that law will be adopted by which the validity of a contract, as the parties have made it, is best sustained. This court says, in Pritchard vs. Norton, 106 U. S., 124, in the language of Phillimore:

"As all the foregoing rules rest upon the presumption "that the obligor has voluntarily submitted himself to a "particular local law, that presumption may be rebutted, "either by express declaration to the contrary, or by the "fact that the obligation is illegal by that particular law, "though legal by another. The parties cannot be pre- "sumed to have contemplated a law which would defeat "their engagements."

And the court adds:

"This rule, if universally applicable, which perhaps "it is not, though founded on the maxim, *et res magis "valeat, quam pereat*, would be decisive of the present "controversy, as conclusive of the question of the appli- "cation of the law of Louisiana, by which alone the "undertaking of the obligor can be upheld."

"At all events, it is a circumstance, highly persua- "sive in its character, of the presumed intention of the "parties, and entitled to prevail unless controlled by more "express and positive proofs of a contrary intent."

And Mr. Wharton says, Section 507, Conflict of Laws: "More reasonable is the view maintained by Sav- "igny, and substantially adopted by Mr. Parsons, that

"when there are two conflicting laws bearing on this "point, that law will be adopted by which the validity of "the obligation is best maintained."

Gibson vs. Connecticut Ins. Co., 77 Fed. Rep., 561, was a suit on a fire insurance policy issued on a Minnesota property by a Connecticut company to a citizen of Missouri, and the question was as to the applicatory law. It was held in an able opinion by Judge Phillips that the parties must be held to have contracted with reference to the Minnesota law, because that was essential to the purposes of the contract, quoting from Chitty, J., *in re* Missouri S. S. Co., 42 Ch., Div. 329, as follows:

"The circumstances that the stipulations, which the "client asks to have struck out of the contract, are "allowed by the law of one country and disallowed by the "law of another, affords a cogent reason for holding that "the parties were contracting with reference to the law "of the country which allowed, and not to the law "which disallowed the stipulation. It is unreasonable to "presume that the parties inserted into the contract stipu-"lations which they intended should be nugatory and "void."

Applying these established principles to the case at bar, the conclusion is inevitable that the parties must have contracted with reference to the New York law, because that was essential to the plan ot insurance which was selected and adopted. The insured could not enjoy the benefits of a mutual insurance company, and a *fortiori* on the tontine plan of insurance, without becoming, in the words of this court, "an associate in a great sheme "whereunder each became interested in the engagements "of all." Ignoring the express stipulation for the New York law, the parties could not be presumed to have selected a law which would defeat their engagement by destroying the mutuality upon which it was based.

IX.

The selection of the New York law as the applicatory law of the contract, being thus in furtherence of and necessitated by the contract, and the plan of insurance embodied therein, was in no wise in violation of the Missouri law or prejudicial to the comity of the State.

It will not be disputed that the agreement for the New York law was made in good faith and in furtherance of and indeed necessitated by the purposes of the contract. No contention to the contrary is made in the opinion of the Missouri court.

But we concede that the principle of universal law which we have invoked is subject to a second qualification, that the foreign law agreed upon must not be injurious to the interests of the State, or, as stated by Story, "the State shall not suffer prejudice by its comity."

The opinion of the Missouri court does not proceed at all upon the theory that the interstate contract of insurance made in this case between the parties was against good morals or public policy, under the recognized qualification of the rule of international law. If this had been the view of the court, the contract could not have been enforced at all, as the court would have declined to enforce a contract made with reference to a foreign law, which was inconsistent with good morals, or otherwise uninforcible under the recognized qualification under the general rule. This is not a case where the court could reject a single stipulation and enforce the contract without it, because the right of temporary insurance which the insured had contracted away to his associates in the great interstate scheme of insurance, was the very basis on which recovery is sought. But the court proceeded upon another theory, that is, that the statute as construed by the court, not only avoided the contract between the

parties, but *ex proprio vigore* made a different contract between them.

It is not contended that the Missouri statute prohibits interstate mutual life insurance contracts, whether on the tontine plan or otherwise. On the contrary, the statute, by permitting foreign life insurance companies to do business in the State with the deposit there of their own charters with the Insurance Department, clearly contemplates that they shall make *interstate contracts* of life insurance according to the known and recognized plan of mutual insurance.

Conceding that the statutes of Missouri disclose the public policy of the State against the forfeiture of life insurance policies, the policy contract in this case harmonizes therewith in the adoption of a uniform non-forfeiture provision for all its policy-holders of the same class, which the insured deliberately applied for and accepted. It was conceded, and the Circuit Court rendered judgment for plaintiff in error on that very ground, that the paid-up value secured by the policy, which plaintiff in error tendered and still tenders, was exactly equal to the paid-up value secured by the Missouri statute, being the full value of the reserve. It is true the policy did not give him the temporary insurance as an alternative for paid-up insurance, but it did give him a contingent interest in the event of *survivorship* in the *surplus* accruing from all the policies of the same class, *to be distributed at the end of the tontine period.*

The argument that the contract was in violation of the public policy of Missouri because it provided a *different* adjustment in case of default, proves too much, because that would make an interstate contract impossible where there was a difference in the laws of two sovereignties. It would make impossible any "*choice* of law." It s *because* there is a difference in the law, that the rules of

private international law are required to determine the situs of contracts.

But since the bringing of this suit, the General Assembly of Missouri has recognized that such contentions as defendant in error is making in this case are fatal to the vital principles of mutual life insurance, and the law here invoked was amended, see Session Acts of 1895, p. 97, R. S. 1899, Sec. ——; so that now parties to interstate contracts of life insurance are in express terms *authorized to select* the non-forfeiture provisions of other States, provided only that not more than three years' payment of premiums are required. In other words the public policy of the State recognizes the right of "choice of law."

An illustration of the established public policy which warrants the court in refusing to enforce a contract for a foreign law, may be found in the contracts of carriers of foreign shipments, wherein it is sought to secure exemption from the negligence of employes, such stipulations for exemption being permitted by foreign law, but are against the public policy of this country and are uninforcible in our courts. In such cases, stipulations for the foreign law have been held not to be agreements in good faith for a foreign law in furtherance of the purposes of the contract, but mere devices to avoid the effect of the American law in a question of controlling public policy, and *for that reason* the courts have declined to enforce such stipulations. See Steamship Co. vs. Insurance Co., 129 U. S. 397; "Bradford City," 29 Fed. Rep., 373

Oscanyan vs. Arms Company, 103 U. S. 261, quoting Story on Conflict of Laws, Sec. 258, is also an illustration of the qualification of the law of comity in the enforcement of a foreign law.

These illustrations, however, demonstrate that this qualification of the law of comity can have no possible application to the case at bar, where it must be conceded

that the choice of the foreign law was made in good faith in furtherance of and necessitated by the contract, and the essential justice of this choice of law and its harmony with the public policy of the State of Missouri had been declared by the General Assembly of the State four years before this decision of the Supreme Court of the State.

The right of choice of law is thus inherent in the right of interstate contract, and the exercise of this right in the case at bar was in furtherance of and necessitated by the contract, and in no wise in violation of the laws or prejudicial to the public policy of the State of Missouri.

It is not disputed that these principles would control if the contract had been made between natural persons. This brings us to the consideration of the only ground upon which the decision of the Missouri court is sought to be sustained, and that is that these principles of universal law are inapplicable to the case at bar because one of the parties to this interstate contract was a foreign corporation doing business, as claimed, in the State *ex gratia* through the comity of the State.

X.

Conceding that plaintiff in error, as a life insurance company of New York, was doing business in Missouri through the comity of the State, this did not disable the parties to this interstate contract from contracting in good faith under the foregoing rules of universal law in furtherance of the purposes of their contract, as to the applicatory law thereof.—This admission by comity did not make plaintiff in error a domestic corporation, and its contracts with the citizens of Missouri are interstate contracts governed by the foregoing rule sof universal law.

It is assumed in discussing this phase of the case that plaintiff in error, a New York corporation, was doing business in Missouri through the comity of the State. It

follows that the State could have excluded it entirely from doing business in the State, or could have admitted it only upon the condition of its becoming reincorporated as a *domestic* corporation. It follows also, as declared by this court, that the absolute power of exclusion includes the right to exact the payment of a license tax for the privilege, or to impose such conditions as it might deem fit, provided, in the words of this court in Insurance Co. vs. French, 18 Howard, 407:

"Such conditions are not repugnant to the constitution "or laws of the United States, or inconsistent with those "rules of public law which secure the jurisdiction and "authority of each State from encroachments by all others, "or that principle of natural justice which forbids con- "demnation without opportunity for defense."

But assuming that the State of Missouri did have the power to exclude foreign life insurance companies, or to require them to reincorporate as domestic corporations, it did not see fit to do so. It did authorize their admission as foreign corporations, requiring them to deposit their charters from their own States with the Insurance Department of the State, and also accepts evidence of deposits of securities for their policy-holders with the insurance department of the State of their incorporation. They are admitted, therefore, as *foreign* corporations and do business as such, and their contracts made through their Missouri offices with citizens of Missouri are *interstate contracts*, between subjects of different sovereignties, and are governed by the rules of universal law applicable to such contracts.

Assuming, therefore, that foreign life insurance companies are not citizens within the meaning of Article IV, Section 2, of the Federal Constitution, yet they are persons included in the Fourteenth Amendment, and when admitted into a State, through comity, to do business therein, they are *persons* within its jurisdiction, entitled to

the equal protection of the laws, and are protected by the constitutional guarantee against being deprived of life, liberty or property without due process of law.

Santa Clara County vs. So. Pac. R. R. Co., 118 U. S., 396.

Pembina Mining Co. vs. Pennsylvania, 125 U. S., 181.

Railroad Co. vs. Gibbs, 142 U. S., 386, 391.

Railroad Co. vs. Ellis, 165 U. S., 150, 154.

Smith vs. Ames, 169 U. S., 466, 522.

In Blake vs. McClung, 172 U. S., 239, it was held that a business corporation which had not been admitted to do business in Tennessee, for that very reason was not within the jurisdiction of that State, within the meaning of the Fourteenth Amendment, and it was *therefore* not entitled to complain of discriminating legislation of that State. *Ergo*, if the corporation had been admitted to do business in the State, it would have been "within its jurisdictton," and protected by the Federal guarantees against discriminating State legislation.

Plaintiff in error, therefore, was admitted into Missouri, through the comity of the State, to do business as a *foreign* corporation. The State of Missouri, under this assumption, could have required its reincorporation as a Missouri company, and then the question presented in this case as between the company and citizens of Missouri could not have been raised, and its contracts with citizens of Missouri would have necessarily been *domestic* contracts. But the State of Missouri did not see fit to take this course, but permitted plaintiff in error, under such conditions as it saw fit to impose, to come into the State and do business as a *foreign* corporation, making contracts *as such* with its citizens. The law upon this subject

was thoroughly construed and fully declared by this court in Canada Southern Ry. Co. vs. Gebhard, 109 U. S., 527, where the authorities as to the situs and powers of foreign corporations doing business in other sovereignties were exhaustively reviewed.

Suit was brought in New York by holders of the mortgage bonds of the Canada Southern Railway Company who had not consented to the refunding of their securities under a composition agreement, which had been effected under act of the Canadian Parliament, defendant being a Canada corporation. There was no constitutional prohibition in Canada of the impairment of the obligation of contracts. It was held that the arrangement act was valid, binding non-assenting bondholders, and should be given the same effect in courts of the United States.

On page 537, the court (Waite, C. J.,) says:

"The corporation must dwell in the place of its crea-
"tion, and cannot migrate to another sovereignty (Bank
"of Augusta vs. Earle, 13 Pet., 588), though it may do
"business in all places where its charter allows, and the
"local laws do not forbid. R. R. Co. vs. Koontz, 104
"U. S., 12. But wherever it goes for business, it carries
"its charter, as that is the law of its existence (Relf vs.
"Rundell, 103 U. S., 226), and the charter is the same
"abroad as it is at home. Whatever disabilities are
"placed upon the corporation at home it retains abroad,
"and whatever legislative control it is subject to at home,
"must be recognized and submitted to by those who deal
"with it elsewhere. A corporation of one country may be
"excluded from business in another country (Paul vs.
"Virginia, 8 Wall., 168), but, *if admitted, it must, in the*
"*absence of legislation equivalent to making it a corpora-*
"*tion of the latter country be taken both by the government*
"*and those who deal with it, as a creature of the laws of*
"*its own country*, and subject to all the legislative control
"and direction that may be properly exercised over it at
"the place of its creation. Such being the law, it follows
"that every person who deals with a foreign corporation,

"subjects himself to such laws of the foreign government, "affecting the powers and obligations of the corporation "with which he voluntarily contracts, as the known and "established policy of that government authorizes; and "to all intents and purposes he submits his contracts with "the corporations to such a policy of the foreign govern- "ment, and whatever is done by that government in fur- "therance of that policy which binds those in like situa- "tion with himself, will necessarily bind him. He is "*conclusively presumed to have contracted with a view of* "*such laws of that government*, because the corporation "must of necessity be controlled by them, and it has no "power to contract with a view to any other laws with "which they are not in entire harmony. It follows, there- "fore, that anything done at the legal home of the corpor- "ation under the authority of such laws, which discharges it from liability there, discharges it everywhere."

The case at bar is far stronger than the one cited. The court will take notice that a mutual life insurance company is simply the administrator of a fund collected from the policy holders in different States and countries for their benefit, and that a uniform law is *essential* to the administration of the fund. It is eminently proper, and indeed, essential, that parties contracting with the administrator of such a fund, should stipulate for such uniform law for the construction of their mutual rights and obligations under their contract.

It necessarily follows, therefore, that the insurance policy contracts of foreign insurance companies, as contracts of other foreign corporations, made by them with the citizens of a State, when doing business in that State through the comity of the State, are like the contracts of natural persons, subject to the limitations of their own charters, and the *situs* of such contracts is to be determined by the fundamental rules of "universal law."

As will be hereafter seen, this status as foreign corporations does not mean that they were not subject to the laws of the State enacted in the full plentitude of the

police power of the State. The State doubtless could limit their contractual power by prohibiting the making of certain contracts. But unless the foreign corporation is reincorporated as a domestic corporation, it remains a foreign corporation, and its contracts with citizens of the State are interstate contracts, subject to the right of choice of law thereof, which is inherent in the law of interstate contracts. It is interesting to note in this connection that while State departments of insurance have been established in nearly all States of the Union, and careful provision is made for State supervision and examination, there has been no attempt to enforce the reincorporation by foreign companies as domestic companies in any State so far as we have been able to ascertain. This is doubtless from a conviction of the essentially mutual and interstate character of life insurance, as illustrated by the Act of 1895 of the Missouri General Assembly expressly recognizing the right of choice of foreign law, *supra*.

The distinction between a domestic corporation and a foreign corporation invested by a State with powers similar to a domestic corporation, has been frequently considered by this court in questions of jurisdiction. Thus in Louisville, etc., R. R. Co. vs. Louisville Trust Co., 174 U. S., 552, where it was claimed that the plaintiff, an Indiana corporation, afterwards became a corporation of the State of Kentucky, the court said, (page 562):

"This court has often recognized that a corporation "of one State may be made a corporation of another "State by the legislature of that State, in regard to prop "erty and acts within its territorial jurisdiction. Ohio & "Mississippi Railroad Company, vs. Wheeler, 1 Black, "286, 297; Railroad Co. vs. Harris, 12 Wallace, 65, 82; "Railroad Co. vs. Whitton, 13 Wal., 270, 283; Railroad "Co. vs. Vance, 96 U. S., 450; Memphis & Charleston "Railroad Co. vs. Alabama, 107 U. S., 581; Clark "vs. Barnard, 108 U. S., 436, 451, 452; Stone vs. Farm-

"ers' Loan & Trust Co., 116 U. S., 307, 334, Graham vs. "Boston, Hartford & Erie Railroad, 118 U. S., 161, "169; Martin vs. Baltimore and Ohio Railroad, 151 U. "S., 673, 677. But this court has repeatedly said that, in "order to make a corporation, already in existence under "the laws of one State, a corporation of another State, "'the language used must imply creation or adoption in "'such form as to confer the power usually exercised "'over corporations by the State, or by the legislature, "'and such allegiance as a State corporation owes to its "'creator. The mere grant of privileges or powers to it "'as an existing corporation, without more, does not do "'this.' Pennsylvania Railroad vs. St. Louis, Alton and "Terre Haute Railroad, 118 U. S., 290, 296; Goodlett vs. "Louisville and Nashville Railroad, 122 U. S., 391, 405, "408; St. Louis and San Francisco Railway vs. James, "161 U. S., 545, 561."

But it is needless to extend this discussion. So far from claiming that the statute in question made plaintiff in error a Missouri corporation, and therefore its contracts domestic contracts, the court denies the liberty of contract in making a choice of law on the very ground that it was a foreign corporation doing business in the State *ex gratia* through the comity of the State. In other words, the court holds that the contract was a Missouri contract, despite the express agreement of the parties, *because* the plaintiff in error was a foreign corporation.

XI.

This right of choice of the applicatory law, subject to the foregoing qualifications, is inherent in the conception of an interstate contract, and the statute of Missouri as construed by the Supreme Court of that State, deprives the parties to an interstate mutual life insurance contract of this essential element of the right of interstate contract.

As already seen, the right of choice of the applicatory law is inherent in the relation of the parties to an

interstate contract, subject. of course, to the foregoing qualifications, that the choice must be made in good faith and in furtherance of the contract, and shall not be in violation of the law or the public policy of the State wherein the foreign law is sought to be enforced. This right of choice is inherent in the conception of an interstate contract; that is to say, the right grows out of the relation—*i. e.* out of the existence of two systems of law to which the parties are severally subject, and with reference to which they had a right to contract. In the familiar case where the citizens of two different countries make a contract to be performed in a third, the right of choice will be extended to the third country, and in default of the express exercise of the right of choice, the intention of the parties will be inferred from the established legal presumptions of such intention, see Dicey, p. 170, *supra*. For an illustrative case of the selection from the laws of *four* States, see Hubbell vs. Morristown Land and Improvement Company, p. 47, *supra*.

The term "conflict of laws" has been criticised by the later writers on the subject as being inaccurate (see Dicey on Conflict of Laws). Mr. Dicey says that the term "conflict of laws" has been defended on the ground of its applicability, not to any collision between the laws themselves, but to a conflict in the mind of a judge as to which law shall govern a given case. But he says this only gives a forced and new sense to a received expression. He prefers the term "private international law," for, he says, "it brings into light the great and increasing "harmony between rules as to the application of foreign "law which prevail in all civilized countries."

This same thought is expressed by Chief Justice Marshall, in Wayman vs. Southard, *supra*, where he speaks of the principle as one of *universal* law.

It necessarily follows that it is wholly immaterial in the application of these principles of universal law that

one of the parties was a foreign corporation. It is true, it is said, that the contractual capacity of a corporation is limited by the law of its creation, as well as by the law of the State where the transaction takes place. That is to say, it may be prohibited from making certain contracts, but such contracts, as it does make, *must* be attended by the *inherent incidents* of all interstate contracts, to-wit, the right of choice of the applicatory law.

We accept in this court, as we are bound to do, the construction placed upon the statute by the Missouri court. It is conceded in the opinion that, but for the statute, the contract between the parties would have been a New York contract, the parties having admittedly contracted with reference to that law, and, we may add, that being the only law under which their engagements could have been made effective.

But this liberty of contract is denied by the Missouri court, on the ground that it is nothing but an attempted waiver of the provisions of the Missouri statute. Thus the court in its opinion cites the Clements case, 140 U. S., 226, and states that this case presents an element which that case did not, to-wit, the express agreement of the parties with reference to the New York law. But the court construes the statute as prohibiting the parties from contracting with reference to the New York law, saying, Rec., p. 59: "The rule to be deduced from the authori-"ties seems to be that when no statute intervenes prohib-"iting it, a corporation doing business by permission in "another State from that of its incorporation may, by "contract, make the law of the State of its incorporation "the applicatory law of the contract; but that where the "laws of the State in which it does business by license "prohibits such corporations from making certain kinds "of contracts, they can only act in accordance therewith."

While this is not very clear, and seems to assume that there is but *one* party to a life insurance contract, to-wit, the corporation, it certainly means, in the light of the con-

text, this much, that the statute in question prohibits the parties to an interstate mutual life insurance contract, where one of the parties is a citizen of Missouri and the other a foreign company doing business in Missouri, from agreeing upon the applicatory law.

The position of the court in this construction of the statute is further illustrated by its opinion involving the same statute, in another case now pending in this court on writ of error, that of Horton vs. New York Life Ins. Co., 151 Mo., 604.

There it was contended, as here, that the place of contract was fixed by the express agreement of the parties, but that, irrespective of that agreement, it was made a New York contract by the acts of the parties. The court there holds that the contract was not complete until the poliey was delivered in Missouri, saying: "Under "these conditions, the contract was not complete until the "policy was delivered in this State, and *therefore* it is a "Missouri contract." The court reaffirms the decision in this case in holding that it was *incompetent* for the parties to contract with reference to the New York law.

Thus we have this anomalous situation—the fundamental principle of international law, or, as Chief Justice Marshall terms it, *universal* law, that it is the will of the contracting parties which fixes the place of contract, is ignored. That is, it is held incompetent for them to have any will in the matter, and yet the court determines the law of the contract from what it finds to be the place of contract, entirely overlooking, that the law of the place of contract *lex loci contractus*, and the place of performance *lex loci solutionis*, are both of them presumptions grounded on the *probable intention* of the parties. See Dicey, Conflict of Laws, p. 570.

Thus the court holds, in the same opinion, that it is unlawful for the parties to have *any* intent, and yet undertakes to give effect to circumstances, whose only value in

law is as indicative of such intent. Could there be a more complete ignoring of the fundamental rules of universal law? With all due respect to the learned court, is not this in line with the logic, which holds that the policy is a Missouri contract *because* of the statute, and the statute is a part of the contract, *because* it is a Missouri contract! *Curriculum nefas!*

Such is the anomaly, the *confusion*, which results from this attempted ignoring of the rules of universal law.

XII.

The statute of Missouri, as construed by the Supreme Court, not only denies to the contracting parties, in making an interstate contract, the right of choice of the applicatory law, but makes a new contract for the parties which they would not have made and contrary to their intent.

The parties in this case made a contract of insurance, embodying a plan deliberately selected and adopted, whereunder the insured associated himself with the other members of the tontine class, and the members of such class acquired reciprocal contingent interests in the event of survivorship in all the policies of the members of the class. As an incident to this plan of insurance and necessary thereto, the surplus accumulations over and above the reserve of the respective policies, were held for the benefit of the survivors. All of the policies of the class contained the same provision for paid-up insurance in the event of default, and none contained any provision for temporary or extended insurance. The features of the plan of insurance have been already explained.

See "Tontine Insurance," Section VII, *supra*.

As already pointed out, it was essential to this plan of insurance that there should be one applicatory, proper

law controlling the policy, and it is obvious that the parties contracted with reference to such law, as their contract could not be performed under any other.

The Supreme Court of Missouri in its opinion says that the statute was written into the contract and controlled its terms.

The doctrine is well settled that the existing law, the unwritten as well as the written law, is presumed to be incorporated into the contract. The general law is thus stated by Washington, J., in Ogden vs. Saunders, 12 Wheaton, 258:

"The law, then, which has this binding obligation, "must govern and control the contract in every shape in "which it is intended to bear upon it, whether it affects "its validity, construction, or discharge. * * * It is, "then, the municipal law of the State, whether that be "written or unwritten, which is emphatically the law of "the contract made within the State, and must govern it "throughout, wherever its performance is sought to be "enforced."

The parties to the contract are conclusively presumed to have *intended* to be bound by the existing law. The law of the contract always envelops it. Every contract must have one applicatory law and but one—that which Savigny calls its own proper law.

The law is written into the contract because the parties are conclusively presumed to have contracted with reference to that law.

But the doctrine has its obvious limitations, illustrated by the case at bar. The doctrine rests upon presumed *intention*. Parties are conclusively presumed to have contracted with reference to the existing law governing their contract, and of course they cannot contract in violation of the law. But statutory provisions cannot be written into contracts unless they are consistent and reconcilable with the contract which the parties did make.

If the statute cannot be read into the contract without defeating the obvious purpose of the parties in the essential terms of the contract and making a new contract for them, the doctrine has no application.

If the statute cannot be reconciled with the contract, there is simply a void attempt to contract in violation of the statute. The State can defeat the attempt, can refuse to enforce the contract, and can punish the illegal attempt and can forfeit the license of an offending corporation which is a party to such illegal attempt. But to make a different contract for the parties than that which they intended to make, and did make, and enforce it as a contract, is beyond the power of the State.

The obvious limitations of the legal principle invoked by the Missouri court as to the writing of statutes into contracts, are illustrated by the language of the same court in the cases cited in the opinion in support of this position. Thus it was said in State to the use of Wolf vs. Berning, 74 Mo., 87, and repeated in Reed vs. Painter, 129 Mo., 680:

"Whatsoever the law annexes as the *incident* of a "contract, whether granting a privilege or announcing a "prohibition, it is as much a part and parcel thereof as "though written therein or endorsed thereon."

See also Straube vs. Ins. Co., 125 Cal., 677.

The limtations of this doctrine could not be better illustrated than in the case at bar. This is not a case where the statute merely annexes a single incident, or prohibits an attempted exemption from liability, as in the case of contracts of carriers, so that the illegal stipulation can be removed without affecting the substance of the obligation.

In the case at bar the right of recovery is based upon the right of temporary or extended insurance to which the parties did not agree, but made a dif-

ferent contract inconsistent therewith. The statute cannot be read into the contract without making a new contract for the parties. It follows, therefore, that the parties to this cause, upon the theory of the court that they could not contract with reference to the New York law, made an ineffectual attempt to exercise the liberty of contract in making an interstate insurance contract, whereby the insured and citizens of other States acquired reciprocal rights and interests in a common fund.

Assuming that such a contract was illegal, the attempt would be void, and all that the law could do would be to refuse to enforce the contract and punish the attempt. Whether in such case there would be any right of action between the parties as not in *pari delicto*, it is immaterial in this case to inquire. This action is predicated upon the theory, which was sustained by the Missouri Snpreme Court, that the statute made a new contract between the parties, despite their intent. That is, it compelled them, *ex proprio vigore*, to be parties to an official type of contract which is inconsistent with the contract which they did make.

But it is not strictly accurate to say that the statute as construed by the opinion of the court makes a contract for the parties against their will. There is this qualification: It does have this effect at the option of the plaintiff. As heretofore shown (Point III, *supra*), the effect of this statute so construed is to give plaintiff the choice of two contracts—the contract which the parties did make and intended to make, and the one which the statute makes for them. While the Supreme Court was considering this very case, the Missouri Court of Appeals (the court having final jurisdiction in the cause) at Kansas City, Linn vs. N. Y. Life Ins. Co., 78 Mo. App., 192, was construing the same form of policy as a New York contract, according to the intent of the parties, and applying

the New York law as construed by the New York courts thereto.

XIII.

The selection in good faith of the applicatory law is an essential incident to the right of interstate contract, and the Missouri statute construed by the Supreme Court as denying this liberty of contract in this essential incident of interstate contract and making a new contract for the parties, violative of their intent, is violative of the constitutional guaranty of liberty of contract in the Fourteenth Amendment, which includes the right, thus denied, as essential to the right of interstate contract.

As we have heretofore pointed out the right to select in good faith the applicatory law of an interstate contract —or, as Mr. Dicey terms it, the *choice of law*—is inherent in the conception of such contract as a principle of universal law controlling the same. It cannot be denied without destroying the right of interstate contract itself. This is forcibly illustrated in the case at bar, where the denial of the right to select an applicatory law governing the contracts relating to this common insurance fund, necessarily destroys the mutuality which adheres in the very nature of such relation.

That liberty protected by the Federal Constitution means more than freedom from physical restraint and includes liberty of contract, is established by Allgeyer vs. Louisiana, *supra*, where the principle was applied to the case of an insurance contract. That case, it is true, is one where the right to contract was for insurance outside of the State on property within the State, and it was held that this was a right of which the State could not deprive its citizens. The court said there that "the mere fact "that a person may be within the limits of a particular "state does not prevent his making a contract outside of

"its limits, while he himself remains within it." The case at bar involves a far more serious invasion of the right to contract, since the statute as construed takes from all mutual life insurance interstate contracts an essential feature thereof, to-wit, the right of *choice* of the applicatory law, which grows out of the very fact that they are interstate contracts; or rather under the anomalous conditions resulting from such a holding, giving plaintiff *alone* the right of choice of the applicatory law.

In Frisby vs. United States, 157 U. S. 160, the court conceded that among the inalienable rights of citizens is that of liberty of contract, yet holding at the same time, what we freely concede, that such liberty is not absolute and universal. It is not denied that the right of contract is subject to the reasonable exercise of the police power, and that the right of contract may be legitimately regulated where the parties are not on an equal contractual plane, or where the public health demands that one party to the contract should be protected against himself. There is nothing in our position inconsistent with the views of the court in Holden vs. Hardy, 169 U. S. 366. The case at bar presents no such question, nor does the Missouri court attempt to sustain its position on any theory that the citizens of the State require protection from themselves in the insurance of their lives.

The citizens of Missouri who take out insurance policies on their lives are not a helpless or dependent class, as employes in certain employments may possible be said to be at the mercy of their employers. On the contrary, they are the most responsible and intelligent class in the community. It is a matter of common knowledge that the parties to interstate life insurance contracts, such as that at bar, are in every sense, intellectually and morally, as well as physically, a *selected* class. The business of insurance is not affected with any public use in the legal sense. No public franchise other than that of incorpora-

tion is exercised, and it is notorious that the business is exposed to the severest competition. In fact, it may be safely said that there is no business in modern society which is so completely based upon personal solicitation upon the part of one of the contracting parties, that is, the insurance company soliciting applications. There is no reason based upon any reasonable exercise of the police power, why a citizen of Missouri should not have the right to determine for himself on what conditions he will insure his life, and *a fortiori* in an interstate contract of life insurance, the parties, *not one party only*, shall not have the right of choice which inheres in the relation under the rules of universal law.

But it is unnecessary to extend this discussion, as the question is not one of any reasonableness in the exercise of the police power, but of the right of the State to destroy the right of interstate contract.

No State has gone beyond the State of Missouri in its assertion that contractual liberty is protected by the constitutional guarantees. Thus State vs. Loomis, 115 Mo., 307, holds the so-called anti-truck law of that State void as an unconstitutional interference with the right of private contract, and the language of the court in this case is quoted approvingly by this court in Railroad Co. vs. Ellis, 165 U. S., 150. Thus the court says:

"The word 'liberty' as used in these constitutional "declarations means more than freedom of locomotion. "It includes and comprehends, among other things, free- "dom of speech, the right of self-defense against unlaw- "ful violence and the right to freely buy and sell as others "may. 2 Story on Constitution (5th Ed.) Section 1590. "From the foregoing descriptions and definitions of due "process of law, or its equivalent law of the land, it must "be evident that this constitutional safeguard condemns "arbitrary, unequal and partial legislation; and it is "equally clear that the right to make contracts and have "them enforced as others may, is one of the rights so "secured to every citizen. * * *"

"Liberty, as we have seen, includes the right to con-
"tract as others may, and to take that right away from a
"class of persons following lawful pursuits, is simply
"depriving such persons of a time-honored right which
"the Constitution undertakes to secure to every citizen.
"Applying the principles of constitutional law above cited
"we can come to no other conclusion than this that these
"sections of the statute are utterly void. They attempt
"to strike down one of the fundamental principles of con-
"stitutional government. If they can stand, it is difficult
"to see an end of such legislation, and the government
"becomes one of special privileges, instead of a compact
"to promote the general welfare of the people. We place
"our conclusion on the broad ground that these sections
"of the statute are not due process of law within the
"meaning of the Constitution."

After citing decisions of other States, the court says:
"The differences, such as they are, (in the cases)
"strengthen rather than weaken the conclusion which we
"have before expressed; for it must be evident that they
"all teach this doctrine, that constitutional declarations
"concerning the liberty of the citizen, though using dif-
"ferent words, are not to be reduced to an empty sound.
"Liberty, we have seen, includes the right to acquire
"property, and that means and includes the right to make
"and enforce contracts. We do not say that such rights
"cannot be regulated by general law, but we do say that
"the Legislature cannot single out one class of persons
"who are competent to contract, and deprive them of
"rights in that respect which are guaranteed to other per-
"sons. The constitutional declaration that no person
"shall be deprived of life, liberty or property without due
"process of law, was designed to protect and preserve the
"existing rights against arbitrary legislation, as well as
"against arbitrary executive and judicial acts. The sec-
"tions of our statute in question, deprive a class of per-
"sons of the right to make and enforce ordinary contracts,
"and they induce a system of *State paternalism* which is
"at war with the fundamental principles of our govern-
"ment, and as we have before said, are not due process
"of law."

In State vs. Julow, 129 Mo., 163, the court still more emphatically asserts the same principle of constitutional protection of liberty of contract, holding void the act of 1893, which made it unlawful for an employer to prohibit an employe from joining or requiring him to leave a trade union. The court says that this is a violation of the liberty and property rights secured by constitutional guarantee. "The rights thus guaranteed are something more "than mere privileges of locomotion; the guaranty is neg- "ative to arbitrary power in every form which results in "the deprivation of a right." The same broad construction of the constitutional guaranty in favor of liberty of contract under the State constitutions has been enforced in the other States. Thus, in Illinois:

Miller vs. People, 117 Ill., 294.

Trover vs. People, 141 Ill., 171.

Ramsey vs. People, 142 Ill., 380.

Braceville Coal Co. vs. People, 147 Ill., 66.

Richey vs. People, 154 Ill., 98.

Harding vs. People, 160 Ill., 459.

following the Loomis case.

So also in Massachusetts:

Commonwealth vs. Perry, 155 Mass., 117.

In California:

Ex-parte Ruback, 85 Cal., 274.

Johnson vs. Goodyear Rubber Co., 59 Pac. Rep., 304.

In Pennsylvania:

Goodcharles vs. Wiseman, 113 Pa., 431.

In New York:

Ex Parte Jacobs, 98 N. Y., 98.

People vs. Marks, 99 N. Y., 377.

People vs. Gibson, 109 N. Y., 389.

In West Virginia:

State vs. Goodwell, 33 W. Va., 179.

In Nebraska:

Low vs. Reese Printing Co., 48 Neb., 127.

South Dakota:

State vs. Scougal, 51 N. W. Rep., 858; 15 L. R. A., 477.

Many of these cases, especially those from Missouri and Illinois, held invalid statutes enacted in the interest of the so-called wage-earning classes, but it will hardly be contended that this is the only class not to be placed under legislative guardianship in determining what is best for their own interests!

XIV.

There is no judicial precedent sustaining the contention of defendant in error.

It is true that in Equitable Life Ins. Co. vs.. Clements, 140 U. S., 226, affirming 32 Fed. Rep. 33, the Supreme Court held that the Missouri non-forfeiture law, being enacted from consideration of public policy, was incapable of waiver between the parties. But this was held only after the policy contract in suit was held upon the evidence to be a *Missouri contract*, and therefore subject to the Missouri law. It seems that it did not even appear that the obligation was accepted in New York, much less that the parties had expressly agreed upon the

law of New York as the applicatory law of the contract. The basis of the decision is clearly shown in the official syllabus.

"A policy of insurance executed in New York by a "New York corporation, doing business in Missouri, upon "an application signed in Missouri, by a resident of "Missouri, made part of the contract, and declaring that "it should not take effect until the first premium shall have "been actually paid during the lifetime of the person pro- "posed for insurance, which is delivered and the first "premium paid in Missouri, is *in the absence of evidence "of the company's acceptance in New York*, a Missouri "contract and governed by the laws of Missouri."

That is to say, there being nothing in the record to show that the parties expressly contracted with reference to the laws of New York and nothing to show the acceptance of the application in New York from which the court could have inferred the intent of the parties, the court gave legal effect to the acts of the parties and applied the law of Missouri. It seems too clear for argument that if the court entertained any such doctrine, as that which is necessary to support plaintiff's position, that insurance contracts are *sui generis*, and are not subject to the general rules of private international law, and that the expressed intent of the parties thereto is to be disregarded in determining their status, the court certainly would not have rendered the opinion which it did. There is nothing in the opinion which warrants the conclusion that the court intended to overrule the law as deliberately declared in case of Washington Co. Bank vs. Hume, 128 U. S., 195, and Pritchard vs. Norton, 106 U. S., 124, *supra*.

But it conclusively appears that the case in 140 U. S., 226, is not a precedent for the case at bar, for these reasons: *First*, in that, in that case, there was no evidence that the application was *accepted in New York;* in this case it is admitted. *Second*, in that case there was no

express agreement of the parties as to the law of New York; in this case there is.

It is sufficient to say of Knight Templar Co. vs. Berry, 1 C. C. A., 561, affirming 46 Fed. Rep., 439, and of Winning vs. Equitable Life Assurance Soc., 58 Fed. Rep., 34, and 7 C. C. A., 359, that in neither of these cases was there any evidence of agreement as to the applicatory law, and therefore the decision of this court in the Clements case was followed.

The same may be said of the decision in Hicks vs. Ins. Co., 60 Fed. Rep., 692, cited by the Missouri court.

As to the opinion of the District Judge in 13 Fed. Rep., 526, in the case of Fletcher vs. Insurance Co., it is sufficient to say that the decision of the Circuit Court was reversed in 117 U. S., 519, this court holding that under a policy similar to the one in suit, the stipulation that the company was not bound by the oral statements of the soliciting agent, but only by the written applications forwarded to the home office, was valid, the lower court having held that the company could not make such a stipulation in its policies.

There is nothing in the subsequent case of Continental Ins. Co. vs. Chamberlain, 132 U. S., 354, inconsistent therewith, nor with the position herewith maintained. The latter case gave effect to a statute of Iowa, which made the local agent the agent of the company, and not of the assured, there being no question but that this was within the legitimate police regulation of the State. See remarks of Harlan, J., in Maier vs. Ins. Co., 78 Fed. Rep., 566.

The often cited case of Paul vs. Virginia, 8 Wallace, 158, affords no support to the contention here involved. That was the case of a fire insurance company making contracts of indemnity with citizens of Virginia against the loss by fire of property located in Virginia, and it was held that the company doing business in Virginia was

properly subjected to pay the license charges imposed by the Virginia law; that the business of fire insurance was not interstate commerce, and that corporations were not citizens within the meaning of Section 2, of Article IV of the Constitution. Whether the business of mutual life insurance is to be differentiated from that of fire insurance as to the commerce clause, will be hereafter considered. But nothing in that case affords any support to the contention here.

Neither is the recent case of Insurance Co. vs. Daggs, 172 U. S., 557, involving the so-called "valued policy" law of Missouri, in point. This policy was a fire insurance case, but it was conceded apparently that the contract was subject to the Missouri law, there being no claim that the parties contracted with reference to any other law, the only question being as to the validity of the statute, which required all fire insurance policies to be valued polices. The court held that this restriction of the business of fire insurance to that class of policies, was a legitimate exercise of the police power of the State, "being a change from one kind of indemnity policy to "another kind, from open policies to valued policies, "both of which are sanctioned by the practice and "law of insurance. And this change is the only com- "pulsion of the law. *It makes no contract for the par- "ties.* In this it permits absolute freedom."

No question was suggested of the applicability of the statute, growing out of the right of choice inherent in an interstate contract, and the court took judicial notice of the "practice and law of insurance."

In Dolan vs. Mutual Reserve Fund Life Association, 173 Mass., 197, the remarks of the court as to the validity of an endorsement printed on the back of the policy, that it should be governed by the laws of New York, were clearly *dicta*, in view of the holding that the endorsement could not be considered as a part of

the contract, as it did not conform to the statutory requirement in being embodied in the contract.

The reference of the court to the Admiralty cases, "Branford City," 29 Fed. Rep., 373, and following cases did not justify the *dicta*, as these decisions related to the validity of stipulations for foreign law in contracts of carriers, whereby exemption from the negligence of employes was secured, such exemptions being held by the American courts to be against public policy and unenforceable in our courts. Such stipulations for the foreign law violate both of the essential conditions of the legitimate choice of law. They are not made in good faith in furtherance of the purposes of the contract, but in evasion of the local law, and are obnoxious to the public policy of the State where sought to be enforced. In other words, such stipulations are directly the *opposite* of the one involved in the case at bar.

XV.

The Missouri statute, as construed by the Supreme Court of that State, denying the right to select, in good faith, the applicatory law of a contract of mutual interstate life insurance, and making a new official contract violative of the intent of the parties, thus essentially denying the right to make interstate contracts of life insurance, was in effect an attempted regulation of commerce between the States.

We have thus far discussed the case upon the theory of the Missouri court, that mutual life insurance companies fall fully within the doctrine of Paul vs. Virginia, 8 Wallace, p. 168, and that the State had the right to exclude the same from doing business within its limits, if it had seen fit to exercise this power. Accepting that doctrine to the fullest extent, and conceding all that may be claimed for the power of the State to enact discriminating

legislation, by way of taxatio nor otherwise, as a condition of giving its assent to the admission of such corporations into the State, we submit that the statute as construed by the Missouri Supreme Court cannot be sustained, and that the right of interstate contract, with its essential incident of agreeing in good faith upon the applicatory law, is protected by the Federal Constitution.

So clear does the case seem in this regard, that it may be deemed unnecessary to present to the considerate judgment of the court, that the business of mutual life insurance as now developed in this country, which was practically unknown at the time of the formation of the constitution, is clearly to be differentiated in principle from the insurance business considered by this court in Paul vs. Virginia, 8 Wallace, and following cases. We do not overlook that it has been repeatedly held by the court that contracts of fire insurance do not constitute interstate commerce, and that this doctrine has been reaffirmed in Insurance Co. vs. New York, 119 U. S., 110, and in Hooper vs. California, 150 U. S., 648, and extended to the business of marine insurance; nor do we overlook the difference between commerce and the incidents of commercial intercourse, heretofore declared by this court.

None the less, there are fundamental differences between the relation of mutual life insurance, affected by interstate contracts, through the instrumentality of the mutual companies such as the plaintiff in error in this case, and contracts of either fire or marine insurance. The lat'er, as described in the opinion in Paul vs. Virginia, are contracts of indemnity, and nothing more. This is peculiarly the case with contracts of fire insurance discussed by the court in Paul vs. Virginia. There the considerations demanding local control are obvious. The contract involves indemnity against the loss by fire of property located permanently within the jurisdiction.

On the other hand, the insured in a life insurance policy, it is true, has in one sense the security of indemnity against the uncertainty of his individual life, but in a broader sense, as said by this court by Mr. Justice Bradley in the Statham case, *supra:* "The assured parties "are associates in a great scheme. This associate rela- "tion exists whether the company be a mutual one or not. "Each is interested in the engagements of all, for out of "the co-existence of many risks arises the law of aver- "ages, which underlies the whole business." There is nothing *local* in the life insurance contract. The assured may be in one State to-day and in another State or country to-morrow, and as is illustrated by some of the cases hereinbefore cited, the forum where the contract is finally enforced may be different from that, not only of the company, but that of the residence of the insured when the contract was made.

In Liverpool Ins. Co vs. Massachusetts, 10 Wallace, p. 573, the court said:

"The case of Paul vs. Virginia decided that the "business of insurance as *ordinarily* conducted was not "commerce, and that a corporation of one State having "an agency by which it conducted that business in "another State, was not engaged in commerce between "the States."

The very essence of the mutual interstate life insurance contract is the *associate relation.* Commerce in the constitutional sense has been held to be more than traffic —to include the means by which traffic is carried on. But it has to-day in the advancement of society and the multiplication of the forms and means whereby human intercourse is carried on, a much broader signification than when the constitution was adopted. In the words of Chief Justice Marshall, in Gibbons vs. Ogden, "com- "merce undoubtedly is traffic, but it is something more "—it is intercourse."

It is, therefore, submitted that the association of citizens of different States and countries in such organizations as the plaintiff in error for the purpose of protecting the uncertainties of the individual life through scientific ascertainment of the average life, is in its essence *commercial intercourse*, and as such belongs to national control; and therefore such right of association is entitled to be protected against such legislation as the Missouri statute, which, as construed by the Supreme Court of that State, renders this associate relation impossible.

The intimate and essential relation between this right of selection of the applicatory law in interstate contracts of mutual life insurance and the essential and foundation principles of *commercial intercourse*, is forcibly illustrated by the impressive language of Mr. Justice Story on Conflict of Laws (8th Ed.), Sec. 242.

"The rule (of enforcing the proper law of the "contract) is founded, not merely in the convenience, "but in the *necessities* of nations; for otherwise it would "be *impracticable* for them to carry on an extensive "*intercourse and commerce* with each other. The whole "system of agencies, of purchases and sales, of mutual "credits, and of transfers of negotiable instruments, rests "on this foundation; and the nation which should refuse "to acknowledge the common principles would soon find "its whole commercial intercourse reduced to a state like "that which now exists amongst savage tribes, among the "barbarous nations of Sumatra, and among other nations "of Asia washed by the Pacific. '*Jus autem gentium*,' "says the Institute of Justinian, '*omni humano generi* "'*commune est*; *nam, usu exigete, et humanis necessi*- "'*tatibus, gentes humanae jura quaedam sibi constituer*- "'*unt. Et ex hoc jure gentium, omnes pene contractus* "'*introducti sunt, ut emptio et venditio, locatio et con*- "'*ductio, societas, depositum, mutuum, et alii innumer*- "'*abiles.*" No more forcible application can be pro- "pounded of this imperial doctrine, than the subject of "international private contracts. In this, as a general "principle, there seems a universal consent of all courts "and jurists, foreign and domestic."

In Addyston Pipe and Steel Company vs. United States, 175 U. S., 211, the court discusses this commerce clause, and conceding that liberty of contract is protected by the Federal Constitution, holds that it is to a certain extent limited by the national power to regulate commerce, and speaking of certain confusion in the law resulting from our diverse sovereignties on subjects which are within State jurisdiction, says at page 233:

"They are results and the necessary accompaniment "of the division of sovereignty between the States on "the one hand and the Federal Government on the other, "and yet the enormous and inestimable benefits arising "from the existence of separate, independent and sover- "eign States have completely submerged the compara- "tively minor evils, inconsistent judgments and different "laws upon many of the subjects over which the States "have exclusive jurisdiction. But upon the matter of "interstate and foreign commerce, and the proper regula- "tion thereof, the subject being not alone national, but "international in its character, the great importance of "having but one source for the law which regulates that "commerce throughout the length and breadth of the "land, cannot, in our opinion, be overestimated."

So the subject presented in the case at bar is not only national, but international in character. The right of interstate contract in a subject which is essentially international as well as national, that of the scientific averaging of human life on the broadest possible basis of human experience, is destroyed by the Missouri statute under the construction given by the Missouri court.

As this court said *in re* Debs, 158 U. S., 591: "Constitutional provisions do not change, but their operation extends to new matters, as the modes of business and habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon and on water by canal boat and sailing vessel, yet

in its actual operation it touches and regulates transportation by modes then unkown, the railroad train and the steamship. Just so it is with the grant of the national government with power over interstate commerce. The constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce the future shall develop."

No better evidence of the essential national and international character of modern life insurance can be found than in the insurance departments of the several States, to which allusion has already been made. They exist in substantially all of the States, and without exception provide for licensing foreign companies and the valuation of policies by the recognized international standards of human experience. When Paul vs. Virginia was decided, the business of life insurance in this country was, to a great extent, local, that is, conducted through the domestic contracts by stock companies. The great and commanding organizations of the present day had hardly begun the amazing development which has made them the greatest associations of administrative trusts in the business world.

It is therefore submitted that the right of interstate contract in such a business, essentially national and international, is not a mere *incident* of commercial intercourse, but is *commercial intercourse* itself, and is therefore entitled to the protection of the national power in the regulation of commerce.

XVI.

The assertion of the constitutional protection of the right of interstate contract in mutual life insurance, and of the right of choice therein in good faith of the proper

law of such contract under the rules of universal law, in no wise impairs the just authority of the State in the exercise of its legitimate police power, or in its control over foreign corporations doing business through comity in the State.

There is nothing in the positions, which we have maintained, which in anywise impairs the just authority of the State in the full plentitude of its police power. If the position last discussed is held to be sound, and the business of mutual life insurance affected by interstate contracts is held to be essentially interstate commerce, and not to be included in the doctrine of Paul vs. Virginia, even on that theory the legitimate police power of the State in the protection of its people would be in no wise impaired. It could exact requirements of publicity, guarantees of solvency; in fact, make all the requirements that are now made by the several States in the administration of their respective insurance bureaus for the protection of the public. This court has frequently affirmed the State police regulation of the railroad systems, which are direct instruments of interstate commerce.

But on the other hand, assuming that the doctrine of Paul vs. Virginia applies fully to interstate contracts of mutual life insurance, the State would have also the power, if it chose to exercise it, to make all the contracts of the foreign insurance companies with its own citizens, *domestic* contracts, by requiring their reincorporation as domestic corporations. It could not prevent its own citizens from making interstate insurance contracts with corporations of other States, whether on the lives of the citizens of the State or on property located in the State, see Allgeyer vs. Louisiana, *supra*, although agents assuming to act in the State for such corporations without authority from the State could be punished by the State therefor, Hooper vs. California, *supra*. The State could prohibit

certain kinds of contracts from being made, or require all of its insurance contracts to be of a certain class, under the known practice and law of insurance, as in Insurance Co. vs. Daggs, *supra*. It could place such conditions as it chooses upon foreign corporations coming into the State, and enact discriminating legislation in the way of taxation in consideration of such privilege.

Assuming therefore the power of the State over the business of life insurance companies, if the foreign company is convicted of violating the State law prohibiting certain classes of contracts, it could be excluded from doing business in the State, and could find no remedy under the Federal Constitution, as recently declared in Waters-Pierce Oil Co. vs. State of Texas.

But the case at bar presents a very different question from any involved in the last cited case, or in any wherein the court has discussed the State control over the admission of foreign corporations not engaged in interstate commerce. Here is involved, not the right of control of foreign corporations, but the right of *interstate contract*. The contention here made is that the power of the State to exclude foreign corporations includes the right to change interstate contracts into domestic contracts, by giving one of the parties to an interstate contract the option of enforcing upon the other an official type of a domestic contract.

It is of the very essence of socialism, according to the definition by LeRoy Beaulieu, to substitute for a contract whose terms have been fully adopted and freely agreed to, *official types* of contracts.

Even if we concede the power of the State to say what contracts corporations shall make, concede that it has the same power over foreign as over domestic corporations, which is the utmost that can be claimed, it cannot, under the form of regulating the exercise of the right of contract, deny the *right* of contract.

A fortiori the State cannot say that a contract for one thing shall mean another thing. The power to invalidate contracts does not carry with it the power to make contracts. We compare this extraordinary position of the Missouri court in this denial of the right of interstate contract with the recent declaration of that court in State *ex rel* vs. Switzer, 143 Mo., p. 323, where the court said:

"Paternalism, whether State or Federal, as the deriva-
"tion of the term implies, is an assumption by the gov-
"ernment of a *quasi* fatherly relation of the citizen and
"his family, involving excessive governmental regulation
"of the private affairs and business methods and interests
"of the people, upon the theory that the people are incap-
"able of managing their own affairs, and is pernicious
"in its tendencies. * * * Paternalism is a plant
"which should receive no nourishment upon the soil of
"Missouri."

XVII.

The judgment of the Supreme Court of Missouri should be reversed.

FREDERICK N. JUDSON,
For Plaintiff in Error.

GEO. W. HUBBELL,
Of Counsel.